83-397

Office Supreme Court, U.S.
FILED
SEP 7, 1983
ALEXANDER L. STEVAS,
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No. - .

In the
Supreme Court of the United States.

OCTOBER TERM, 1983.

OUIMET CORPORATION, OUIMET STAY & LEATHER COMPANY, OUIMET WELTING COMPANY AND EMIL R. OUIMET WAREHAM TRUST,
PETITIONERS,

v.

PENSION BENEFIT GUARANTY CORPORATION, AVON SOLE COMPANY, TENN-ERO CORPORATION AND HERBERT KAHN, TRUSTEE,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Questions Presented.

1. Whether the decision of the United States Court of Appeals for the First Circuit in its first opinion erroneously imposed under ERISA § 4062, 29 U.S.C. § 1362, joint and several liability on *all* members of the control group of corporations[1] for the entire underfunding ($552,339.64) of a terminated pension plan of one of its members despite the "retroactivity inherent in the Act," or, in the alternative, should such liability be limited to the amount of unfunded vested benefits which accrued after the direct employer involved with the pension plan became a member of the control group?

2. Whether the decision of the United States Court of Appeals for the First Circuit which initially imposed joint and several liability on *all* members of the control group of corporations for the deficiency in funding on a lawfully terminated pension plan contracted for and maintained by one of its bankrupt members, namely, Avon Sole Company, erroneously excluded the bankrupt members from such liability in its second opinion?

3. Whether the decision of the United States Court of Appeals for the First Circuit erroneously held that liability among the members of the control group of corporations should be allocated on a *pro rata* basis and whether the decision erroneously denied the solvent members of the control group a right of indemnification from the bankrupt members of the control group?

4. Whether the decision of the United States Court of Appeals for the First Circuit in its second opinion following remand erroneously held that petitioners were jointly and sever-

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[1] In accordance with Rule 28.1, Ouimet Corporation, Ouimet Stay & Leather Company and Emil R. Ouimet Wareham Trust are affiliated corporations. Avon Sole Company, before its bankruptcy, was a wholly owned subsidiary of Ouimet Corporation.

ally liable for interest on the funding deficiency at the rates established under 26 U.S.C. § 6621, and, if not, erroneously held that the interest added to such liability is not subject to the 30% limitation of liability provided in ERISA § 4062, 29 U.S.C. § 1362?

5. Whether the decision of the United States Court of Appeals for the First Circuit erroneously construed the decision of this Court in *United States* v. *Vogel Fertilizer Company*, 455 U.S. 16 (1982) by applying the attribution rules of § 1563(d) and (e) of the Internal Revenue Code to the 80% stockholder of the control group?

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3 Moore's Federal Practice ¶ 14.03[3] 22
Sen. Report # 93-127, 93d Cong. 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 4862 26

Statutory Provisions Involved.

UNITED STATES CONSTITUTION, AMENDMENT V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

INTERNAL REVENUE CODE OF 1954.

Section 414.

> (b) EMPLOYEES OF CONTROLLED GROUP OF CORPORATIONS. — For purposes of sections 401, 408(k), 410, 411 and 415, all employees of all corporations which are members of a controlled group of corporations (within the meaning of section 1563(a), determined without regard to section 1563(a)(4) and (e)(3)(C)) shall be treated as employed by a single employer. With respect to a plan adopted by more than one such corporation, the minimum funding standard of section 412, the tax imposed by section 4971, and the applicable limitations provided by section 404(a) shall be determined as if all such employers were a single employer, and allocated to each employer in accordance with regulations prescribed by the Secretary.

(c) EMPLOYEES OF PARTNERSHIPS, PROPRIETORSHIPS, ETC., WHICH ARE UNDER COMMON CONTROL. — For purposes of sections 401, 408(k), 410, 411 and 415, under regulations prescribed by the Secretary, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer. The regulations prescribed under this subsection shall be based on principles similar to the principles which apply in the case of subsection (b).

Section 6601. Interest on Underpayment, Nonpayment, or Extensions of Time for Payment of Tax.

(a) GENERAL RULE — If any amount of tax imposed by this title (whether required to be shown on a return, or to be paid by stamp or by some other method) is not paid on or before the last date prescribed for payment, interest on such amount at an annual rate established under section 6621 shall be paid for the period from such last date to the date paid.

. . . . . .

(e) APPLICABLE RULES — Except as otherwise provided in this title —

(1) INTEREST TREATED AS TAX — Interest prescribed under this section on any tax shall be paid upon notice and demand, and shall be assessed, collected, and paid in the same manner as taxes. Any reference in this title (except subchapter B of chapter 63, relating to deficiency procedures) to any tax imposed by this title shall be deemed also to refer to interest imposed by this section on such tax.

(2) NO INTEREST ON INTEREST — No interest under this section shall be imposed on the interest provided by this section.[2]

. . . . . .

Section 6621. Determination of Rate of Interest.

(a) IN GENERAL — The annual rate established under this section shall be such adjusted rate as is established by the Secretary of subsection (b).

. . . . . .

(b) ADJUSTMENT OF INTEREST RATE — The Secretary shall establish an adjusted rate of interest for the purpose of subsection (a) not later than October 15 of any year if the adjusted prime rate charged by banks during September of that year, rounded to the nearest full percent, is at least a full percentage point more or less than the interest rate which is then in effect. Any such adjusted rate of interest shall be equal to the adjusted prime rate charged by banks, rounded to the nearest full percent, and shall become effective on February 1 of the immediately succeeding year. An adjustment provided for under this subsection may not be made prior to the expiration of 23 months following the date of any preceding adjustment under this subsection which changes the rate of interest.[3]

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[2] 26 U.S.C. § 6601(e) deleted by P.L. 97-248, § 344, which added a new section 6622 allowing interest to be compounded daily for interest accruing after December 31, 1982.

[3] P.L. 97-248 amended § 6621(b) and applies to adjustments taking effect on January 1, 1983.

TITLE IV OF ERISA § 4001(b), 29 U.S.C. § 1301(b).

> An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of section 401(c)(1) of the Internal Revenue Code of 1954. For purposes of this title, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of the Internal Revenue Code of 1954.

TITLE IV OF ERISA § 4062, 29 U.S.C. § 1362.

> (a) This section applies to any employer who maintained a plan (other than a multiemployer plan) at the time it was terminated. . . .
>
> (b) Any employer to which this section applies shall be liable to the corporation, in an amount equal to the lesser of —
>
> (1) the excess of —
>
> (A) the current value of the plan's benefits guaranteed under this title on the date of termination over
>
> (B) the current value of the plan's assets allocable to such benefits on the date of termination, or
>
> (2) 30 percent of the net worth of the employer determined as of a day, chosen by the corporation but not more than 120 days prior to the date of termination, computed without regard to any liability under this section.
>
> . . . . . .

(d) For purposes of this section the following rules apply in the case of certain corporate reorganizations:

(1) If an employer ceases to exist by reason of a reorganization which involves a mere change in identity, form, or place of organization, however effected, a successor corporation resulting from such reorganization shall be treated as the employer to whom this section applies.

(2) If an employer ceases to exist by reason of a liquidation into a parent corporation, the parent corporation shall be treated as the employer to whom this section applies.

(3) If an employer ceases to exist by reason of a merger, consolidation, or division, the successor corporation or corporations shall be treated as the employer to whom this section applies.

. . . . . .

TITLE IV OF ERISA § 4064, 29 U.S.C. § 1364.

(a) This section applies to all employers who maintain a plan under which more than one employer makes contributions at the time such plan is terminated, or who, at any time within the 5 plan years preceding the date of termination, made contributions under the plan.

(b) The corporation shall determine the liability of each such employer in a manner consistent with section 1362 except that the amount of the liability determined under section 1362(b)(1) with respect to the entire plan shall be allocated to each employer by multiplying such amounts by a fraction —

(1) The numerator of which is the amount required to be contributed to the plan by each employer for the last 5 plan years ending prior to the termination, and

(2) the denominator of which is the total amount required to be contributed to the plan by all such employers for such last 5 years,

and the limitation described in section 1362(b)(2) shall be applied separately to each employer. The corporation may also determine the liability of each such employer on any other equitable basis prescribed by the corporation in regulations.

TITLE IV OF ERISA § 4068, 29 U.S.C. § 1368.

(a) If any employer or employers liable to the corporation under section 1362, 1363, or 1364 of this title neglect or refuse to pay, after demand, the amount of such liability (including interest), there shall be a lien in favor of the corporation upon all property and rights to property, whether real or personal, belonging to such employer or employers.

Term of lien.

(b) The lien imposed by subsection (a) of this section arises on the date of termination of a plan, and continues until the liability imposed under section 1362, 1363, or 1364 of this title is satisfied or becomes unenforceable by reason of lapse of time.

Priority.

(c)(1) Except as otherwise provided under this section, the priority of the lien imposed under subsection (a) of this section shall be determined in the same manner as under section 6323 of Title 26.

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RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Opinions Below.

The opinion of the Court of Appeals following remand, not yet reported, appears in the Appendix hereto [hereinafter cited as "*Ouimet II*"]. The Court of Appeals' initial opinion appears at 630 F.2d 4 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981), *aff'g*, 470 F.Supp. 945 (D. Mass. 1979) [hereinafter cited as "*Ouimet I*"].

Statement of Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was delivered and entered on June 9, 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statement of the Case.

Avon Sole Company (hereinafter "Avon") was a corporation engaged in the manufacture of soles in its plant in Avon, Massachusetts for many years. In 1959, Avon entered into a retirement plan agreement as part of its collective bargaining agreement with its plant employees at the Avon plant (hereinafter "Avon retirement plan."). Thereafter, Avon paid the salaries and benefits to its employees required under its collective bargaining agreement, including contributions under and to the Avon retirement plan. The parties stipulated: "Through the fiscal year ending September 30, 1974, the Plan was funded in compliance with applicable standards under the Internal Revenue Code."

The Avon retirement plan gave Avon "the right to amend, modify, suspend or terminate the Plan" and limited the benefits payable on termination of the plan to "the assets of the Retirement Fund," with Avon having "no liability or obligations . . . to make contribution or payment to establish or maintain the Plan, whether in event of termination of the Plan or otherwise."

On September 13, 1968, Ouimet Corporation (hereinafter "Ouimet"), a Delaware corporation, acquired all of the stock of Avon. The parties stipulated that on September 13, 1968, the Avon retirement plan "had unfunded vested benefits worth $92,000 determined on the basis of actuarial practices, procedures and assumptions that were acceptable under applicable Internal Revenue Code standards."

Because of severe financial difficulties, Avon closed its plant in Massachusetts and terminated the Avon retirement plan on March 25, 1975. ERISA became law on September 2, 1974. Under ERISA, the Avon retirement plan was determined to have a deficiency in assets of some $552,000 to fund the ERISA insured benefits under the plan. On March 22, 1976, Avon and its subsidiary Tenn-ERO were adjudicated bankrupts.

Based on his analysis of the statute, Judge Tauro of the United States District Court concluded that "ERISA imposes termination liability on all affiliates of a control group" (470 F.Supp. at 953) and that such liability was joint and several on each member of the control group. 470 F.Supp. at 954. The Court of Appeals for the First Circuit affirmed the judgment of the district court "but on somewhat different grounds" (*Ouimet I*, 630 F.2d 4 [1st Cir. 1980]), and certiorari was denied by this Court on February 23, 1981. 450 U.S. 914. Thereafter, the case was returned to the bankruptcy judge sitting as a master on Judge Tauro's remand order of March 22, 1979 "for a determination of the net worth of the defendant controlled group," as such was defined in his opinion, namely, Judge Tauro found that the Emil R. Ouimet Wareham Trust, Ouimet Stay & Leather Company, Ouimet Welting, Ouimet Corporation (hereinafter "Ouimet Group") and Avon Sole Company and Tenn-ERO Corporation (hereinafter "bankrupts") "are all members of the same controlled group of businesses." 470 F.Supp. at 949.

The master issued his report (memorandum on remand and judgment) on October 15, 1982 and found *inter alia* that (1) the fair market value of the control group as a single employer was $2,333,000 on the applicable date, 30 percent of which ($699,900) exceeded the deficiency in funding of $552,339; (2) all members of the control group are jointly and severally liable for the full amount of the liability of $552,339.64 regardless of the individual action or inaction, regardless of when they became members of the control group, and regardless of their individual net worths; (3) the bankrupts must contribute a maximum of 30 percent of their value of their estates rather than their entire estates based upon the doctrine of contribution and allocated the total liability among members of the controlled group as follows:

Employer	Amount
Ouimet Corporation	$287,497
Ouimet Stay & Leather Company	95,832
Emil R. Ouimet Wareham Trust	90,508
Bankrupts	78,502
Total	$552,339;

(4) the Ouimet Group is liable for interest on their allocated liability from thirty (30) days after the actual demand for payment (March 5, 1976) to the date of payment at the rates established under 26 U.S.C. § 6621 until payment; and (5) the bankrupts are not liable for interest on their allocated share of liability. All parties appealed from the master's report and filed objections thereto.

Judge Tauro issued an order dated July 14, 1982, in which he affirmed the master's October 15, 1981 judgment and memorandum on remand in its entirety. All parties filed appeals from the July 14, 1982 order of the United States District Court.

On June 9, 1983, the United States Court of Appeals for the First Circuit ordered the judgment of the district court vacated and the cause remanded for further proceedings consistent with its opinion of even date which *inter alia* determined (1) that imposing on the solvent Ouimet Group "the $92,000 liability relating to the period before Avon was acquired does not violate due process . . . [because Ouimet] acquired Avon 'with full knowledge of the Plan and its funding requirements.' *Ouimet*, 630 F.2d at 12" and "[t]he statute places the Ouimet Group in the shoes of Avon regardless of the specifics of Ouimet's acquisition of that company"; (2) rejected petitioners' argument that indemnification was applicable

so as to first apply the bankrupts' estates to the payment of the liability or, in the alternative, that contribution was applicable based on the benefits each derived from the plan, Avon before acquisition and Ouimet after acquisition; (3) then proceeded "to allocate liability which had been created by a federal statute" solely to the solvent members of the Ouimet Group by eliminating the liability of the bankrupts for the reason that "the thirty percent of net worth limitation clearly appears to eliminate the bankruptcy estate as a source of payment to PBGC because the estate had zero, actually negative, net worth"; (4) that PBGC's "regulations imposing interest at the I.R.C. § 6621(a) rate" is "reasonable" and "entitled to deference" and such is not a part of the "liability" imposed by § 1362 and therefore not subject to the 30 percent limitation of net worth; and (5) by construing this Court's opinion in *United States* v. *Vogel Fertilizer Co.*, 455 U.S. 12 (1982), in such a way as to allow the attribution rules of the Internal Revenue Code to apply so as to bring Emil R. Ouimet's ownership in excess of 80 percent of Ouimet Stay & Leather Company by including his wife's shares and those belonging to his father's estate to the number of shares actually owned by Emil R. Ouimet (79.2%). *Ouimet II*, ____ F.2d ____ (App. 1a-21a.)

Reasons for Allowing the Writ.

I. THE *Ouimet II* DECISION IMPOSES RETROACTIVE LIABILITY BEYOND CONSTITUTIONAL LIMITS.

In *Ouimet I*, the First Circuit concluded that ERISA imposed joint and several liability on all members of a controlled group of corporations, which included petitioners and bankrupts, despite the fact that all of the deficiency arose prior to the enactment of ERISA on September 2, 1974. In *Ouimet II*,

the First Circuit held that ERISA can impose liability on members of the controlled group even though a portion of such liability arose prior to the time Avon became a member of the controlled group. Petitioners contend that retroactivity is a finite concept and its judicial approbation cannot exceed its legal and factual foundations.

The First Circuit justified its construction of ERISA in *Ouimet I* and *Ouimet II* by which it treated each member of the controlled group as a "single employer" on three grounds, namely (1) Ouimet purchased Avon in 1968 with the full knowledge of the plan and its funding requirements that had been set up and maintained by Avon in 1959 pursuant to its collective bargaining agreement with its employees; (2) Ouimet participated in the labor negotiations which included the Avon retirement plan after acquisition; and (3) Ouimet filed a consolidated tax return on which Avon's contributions were deducted.

The stipulated facts demonstrate that the factors as relied upon by the First Circuit to justify the retroactivity inherent in the Act, are more illusory than actual, *e.g.*:

> (1) At the time Ouimet acquired Avon in 1968 and indeed until September 2, 1974, Avon by contract and under the applicable statutory provisions had no obligation for any unfunded liability in the event of the plan's termination. Its only responsibility was to make annual contributions, actuarially determined, during the term of the collective bargaining agreement to which it alone was a party. Moreover, after its acquisition by Ouimet, the parent corporation, Ouimet Corporation, had no liability for Avon's undertakings and liabilities under Avon's collective bargaining agreement, including the funding of its pension plan, *United Paperworkers International Union*

v. *T. P. Property Corp.*, 583 F.2d 33 (1st Cir. 1978), *a fortiori*, the other members of the control group, in a brother-sister relationship, had no liability to or under the Avon retirement plan. Thus, when Ouimet stepped into Avon's shoes in 1968, it assumed and incurred no liability for any underfunding of the Avon retirement plan.

(2) Ouimet participated in the labor negotiations of Avon after its acquisition in 1968 and Avon continued to discharge all of its contractual obligations under its collective bargaining agreement through March 25, 1975. It is only the liability imposed by ERISA that Avon, by its bankruptcy, was unable to discharge. The liability arose by virtue of Congress enacting ERISA. The First Circuit held that because of Avon's membership in the Ouimet group, the Ouimet group must pick up this liability even though none of the petitioners ever signed the contract, none of their employees can ever benefit from it, and, under *Ouimet II*, Avon and its creditors escape all liability although it (Avon) was the originator of and sole obligor under the collective bargaining agreement.

(3) Ouimet Corporation and Avon (and later Tenn-ERO) filed consolidated tax returns. Ouimet Stay & Leather Company and the Emil R. Ouimet Wareham Trust, as brother-sister corporations, could not and did not join in the consolidated return. Thus, neither Ouimet Stay & Leather Company nor the Emil R. Ouimet Wareham Trust received any tax benefit, if indeed there was one, from Avon's contribution to the Avon retirement plan.

Because of the above factors, the First Circuit held that, by the enactment of ERISA, Congress instantly and constitution-

ally imposed joint and several liability on all members of the control group of corporations for any underfunding of the terminated plan solely by virtue of their association, nothing more, and even if it included a deficiency which accrued prior to the enactment of ERISA.

Such reading offends the due process limitations of the Constitution because, while

> It is . . . wholly rational — in due process terms — [to] retroactively . . . require the direct employer to provide complete funding of vested pension plan benefits.
>
> Analysis for a *parent* corporation is entirely different — at least where (like Kaplan) it has acquired its subsidiary *after* the latter's establishment of its pension plan. So long as the subsidiary remains a "closed container" in economic terms, the parent has derived no *direct* economic benefit from pension plan underfunding — and of course *it* never promised the pension benefits. In such a situation there is no rational link between the congressional end of insuring pension benefits and the means of assessing the acquiring parent corporation to pay those benefits.
>
> . . . It distorts history to speak of "juggling" corporate structures to "eviscerate" ERISA's provisions before ERISA created a wholly *new* concept of liability.
>
> But the foregoing analysis indicates the rationality, in due process terms, of holding the acquiring parent accountable for underfunding to the extent of any direct financial benefits it derived from the subsidiary during its affiliation. Where funds have been siphoned off from the subsidiary, it has been disabled pro tanto from meeting the responsibilities ERISA imposes. It is not irrational to call on the parent to make good on those liabilities to that extent (effectively restoring the subsidiary to where it

would have been economically but for the transfers to the parent). In due process terms, ERISA could assess liability to the extent of those direct financial benefits, because they have a rational link with the public policy or insuring vested pension benefits through the direct employer's responsibility for past underfunding. . . .

Application of such a concept would satisfy the *Nachman* means-end test, in a way that the full-scale imposition of liability on a parent solely because of its stock ownership could never do.

Pension Benefit Guaranty Corporation v. *Anthony Co.*, 537 F. Supp. 1048, 1055-1056 (N.D. Ill. 1982) (footnotes omitted) (emphasis added).

It is respectfully submitted that the master's findings (1) sustained and recognized the separate legal entities of Ouimet Corporation and Avon Sole Company; (2) failed to demonstrate that Ouimet Corporation manipulated or transferred Avon employees among its affiliated corporation; and (3) failed to establish any direct benefits to Ouimet Corporation from its acquisition and ownership of Avon. To the contrary, the stipulated facts showed that Ouimet Corporation sustained substantial losses from its ownership. Accordingly, it would violate due process to impose retroactive liability for Avon's underfunding on Ouimet Corporation, Ouimet Stay & Leather Company, and Emil R. Ouimet Wareham Trust. *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978); *Fornaris* v. *Ridge Tool Co.*, 423 F.2d 563 (1st Cir. 1970), *rev'd on other grounds*, 400 U.S. 41 (1970); *Pension Benefit Guaranty Corporation* v. *Anthony Co.*, *supra*.

In the alternative, petitioners contend that if membership in the control group is the essential link justifying the retroactive imposition of such liability on members of the control group,

then it must be concluded that only that liability for underfunding which arose during Avon's association (membership) with the petitioners should be subject to collection by PBGC under the statute if the statute is to satisfy the due process requirements of the Constitution. Otherwise:

> [Such] constitutes a naked appropriation of private property upon the basis of transactions with which the owners of the property were never connected. Thus the Act denies due process of law by taking the property of one and bestowing it upon another. This onerous financial burden cannot be justified upon the plea that it is in the interest of economy, or will promote efficiency or safety.

Railroad Retirement Board v. *Alton Railroad Co.*, 295 U.S. 330, 350 (1935).[2]

Accordingly, the joint and several liability of the members of the petitioners should be reduced by the amount of $92,000, the unfunded liability for vested benefits which had accrued under the Avon retirement plan prior to the date Avon became a member of the Ouimet Group. Prior to that date, there is and was no legal basis for making the petitioners liable for Avon's contractual or statutory liability. In this way, the petitioners would be jointly and severally liable only for the unfunded benefits arising subsequent to September 13, 1968 with

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[2] The *Alton* decision was "narrowed" by *Usury* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), "which suggested that the Supreme Court favors granting deference to Congress' judgment in allocating economic benefits and burdens" but *Alton* "had never been expressly overruled" and the "degree of deference" was restricted by *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978). *Shelter Farming Corporation and Carpenters Pension Trust for Southern California* v. *PBGC*, _____ F.2d _____ (9th Cir. 1983).

the result that the retroactive impact of ERISA will at least be limited to and co-extensive with the period during which the proscribed relationship existed. *Cf*: *Pension Benefit Guaranty Corporation* v. *Anthony Co.*, *supra* (liability of parent predicated upon showing of direct benefit).

To hold the petitioners liable without the limitations suggested herein is to pass beyond the constitutional restraints of retroactive legislation so as to reach "back to attach new legal rights and duties to already completed transactions," (Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harvard L. Rev. 692 (1960)) bearing no relationship to the statutory purpose or language. *Accord*, *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978); *Pension Benefit Guaranty Corporation* v. *Anthony Co.*, *supra*. The due process clause prohibits the severe and serious consequences of upsetting long established rights of the petitioners, their stockholders and creditors by attempting to retroactively impose on them a liability that pre-dated the enactment of ERISA or the essential link, *i.e.*, membership in the control group by Avon.

> In fact PBGC would do well to note that *Congress* did not mandate the result for which PBGC argues. It was rather the *Regulations* authorized by Congress that did so, even though the Regulations could have been drafted to avoid the due process violation found by this Court. This is particularly true in terms of the problem posed by this case: a corporate acquisition taking place *after* a pension plan was already adopted and *before* ERISA created a previously unknown and unanticipated concept of personal liability for future contributions. There would have been nothing to prevent the Secretary of the Treasury, in whose expertise Congress reposed its confidence, from defining parent corporation liability in terms

> of parent company benefits. That would have been responsive both to the congressional mandate and to the constitutional due process mandate. Under the circumstances PBGC cannot claim to wrap itself in the mantle of a Congress unjustly subverted by a federal court.

Pension Benefit Guaranty Corporation v. *Anthony Co.*, 542 F. Supp. 43, 44 (N.D. Ill. 1982) (emphasis in original).

Finally, viewed as a classical confrontation between owners and their employees, the sympathies of the First Circuit are obviously with the employees. However, if viewed as a use by Congress of the tax laws to shift the benefits and burdens among taxpayers, then it can be clearly seen as simply granting a retroactive wage increase to the plant employees of Avon. While a retroactive pay increase is always most satisfying, it lacks one essential element of fairness in this instance, as regards the owner-employer, namely, ERISA failed to give a retroactive price increase for Avon's products or a reasonable time within which to amortize the cost.

Instead, a crushing retroactive liability is imposed on the ongoing businesses which are attempting to survive the bankruptcy of one of its members pursuant to a plan to which they are contractual strangers, and on their employees, the payment of which can result in no benefit to them but whose futures are held hostage until the liability is paid.

II. *Ouimet II* is Inconsistent with *Ouimet I* on an Issue of Federal Law Which Should be Settled and Decided by this Court.

A. *Joint and Several Liability of Bankrupt Members of a Control Group.*

In *Ouimet I*, the First Circuit ruled that ERISA requires that all members of a group under common control be jointly and severally liable to PBGC for ERISA termination liability. The case was then remanded to the bankruptcy judge, sitting as a master, for a determination of the Ouimet Group's consolidated net worth in accordance with that decision.

The bankruptcy judge not only determined the Group's consolidated net worth to be $2,333,000, so that each member of the control group was jointly and severally liable for the entire underfunding ($552,339) since it was less than 30 per cent of the consolidated net worth ($699,900), but the master also allocated to each member of the group its respective share of the total liability, as follows:

Employer	Liability
Ouimet Corporation	$287,497
Ouimet Stay & Leather Company	95,832
Emil R. Ouimet Wareham Trust	90,508
Bankrupts	78,502
	$552,339

The First Circuit in *Ouimet II* vacated the master's allocation and stated that the bankrupts should pay no share of the

liability because each had zero net worth and instructed the district court to reallocate the total liability among the solvent members of the control group, namely, the petitioners. In effect, the court in *Ouimet II* severed the bankrupts from the control group. This order ran contrary to the First Circuit's ruling in *Ouimet I*, wherein the Court ruled that "the Ouimet Group, as a group under common control, is *one employer* for purposes of liability under section 1362." *Ouimet I*, 630 F.2d at 12 (emphasis added). Under its rationale in *Ouimet I*, the First Circuit merged the bankrupts with the solvent members of the Ouimet Group to find a single employer having a positive net worth which overcame the 30 per cent limitation of net worth provided in 29 U.S.C. Section 1362. The court thus ruled in *Ouimet I* that "all members of the Ouimet Group would be jointly and severally liable to PBGC." 630 F.2d at 11. Because the bankrupts were members of the Ouimet Group, they were liable to the PBGC as well.

The First Circuit rationalized this approach by referring to the 30 percent net worth limitation of Section 1362 and finding that it "clearly appears to eliminate the bankruptcy estates as a source of payment to PBGC because the estates have zero, actually negative, net worth." *Ouimet II*, _____ F.2d at _____ (App. 11a). Thus, the Court ruled that "[t]here is simply no provision in the statute which authorizes PBGC to impose termination liability on an insolvent party." *Id.* at _____ (App. 12a).

This inconsistency between *Ouimet I* and *Ouimet II* raises an important question of Federal Law which should be decided by this Court; to wit: Whether a bankrupt member of a control group, which was the direct employer, is jointly and severally liable for ERISA termination liability with the solvent members of the group. It is respectfully submitted that the rationale upon which the court relies in *Ouimet II* to elim-

inate liability of the bankrupts is not sustained by the statute or its history.

Assuming, *arguendo*, the correctness of *Ouimet I*, it is clear that consistency and rationality require that the 30 percent limitation of Section 1362 be applied once, namely, to the consolidated group's net worth, and not twice, on an individual basis.

The First Circuit's reasoning in *Ouimet II* appears premised upon "Congress' intent in enacting the net worth ceiling . . . to avoid imposing extreme economic hardship on employers and driving them to the brink of bankruptcy." *Ouimet II*, ____ F.2d at ____ (App. 12a). While perhaps a correct statement of congressional intent for establishing the 30% limitation, that purpose has no application as to whether the bankrupts' liability, as established in *Ouimet I*, may be collected by PBGC.

One flaw in the First Circuit's rationale is that it fails to take into account the provisions of Section 1368(c)(2) which state: "In the case of bankruptcy or insolvency proceedings, the lien imposed under subsection (a) of this section shall be treated in the same manner as a tax due and owing to the United States." This section makes it clear that a bankrupt may have liability under Section 1362. Moreover, far from expressing consideration for general creditors, the statute gives PBGC a priority lien.

Section 1368, therefore, clearly recognizes that the bankrupts have a liability to PBGC and is inconsistent with the First Circuit's second application of the 30 percent limitation of liability to each member of the control group of corporations resulting in the release of the bankrupts from that liability.

It is to be remembered that the First Circuit first ruled in *Ouimet I* that joint and several liability to was properly imposed upon *each* member of the Ouimet group, including the

two bankrupts, as that group constitutes a "single employer." ERISA imposes such termination liability and once properly imposed, the liability may be collected from the bankrupts and Section 1368 provides a priority lien on the assets of the bankrupts in favor of PBGC to assist in its collection. The lien arises upon the termination of a plan and is not discharged by bankruptcy. Notwithstanding the bankruptcy, the PBGC may still collect the termination liability from the bankrupts, even though it has no positive net worth and even though the unsecured creditors may be denied any dividend.

The 30 percent limitation of Section 1362 was designed to preclude a company from being forced into bankruptcy by the congressional imposition of new liability. However, once bankrupt, the statute specifically recognizes that collection may still proceed against the estate of the bankrupt. Obviously, where the bankrupt stands alone as the sole employer, there can be no collection of termination liability if the bankrupt had no net worth on the date of termination of the plan (*contraria*, if it had a positive net worth on date of termination but later went bankrupt). But if the bankrupt is a member of a control group constituting a single employer, it continues to have joint and several liability for the entire amount of the underfunding determined to be due, subject only to 30% of the group's consolidated net worth. Nothing in ERISA provides that the fact of bankruptcy precludes or limits collection of that liability.

A second flaw in the First Circuit's reasoning in *Ouimet II* is that its analysis imposed an additional step to the imposition of termination liability not provided for in the statute or its history and which, petitioners contend, is contrary to congressional intent.

Section 1362 provides that the liability imposed by ERISA pertains to "[a]ny *employer* to which this section applies" (emphasis added). In *Ouimet I*, the Court held that the *employer*

was the Ouimet Group — including the bankrupts. That liability was imposed based upon the group's positive net worth and by application of Section 1362's 30 percent of net worth limitation to the group's combined net worth. The application of the "30 percent" limitation to the group as a single entity is consistent with the use of the singular word "employer" in Section 1362.

However, in ruling that the bankrupts' estates were not subject to imposition of termination liability, the court severed the *single employer* into its component parts and applied for a second time the "30 percent" limitation on an individual basis. Nothing in ERISA sanctions such a result. Moreover, it would be erroneous to suggest that the failure of the statute to provide for a severance of the control group and second application of the "30 percent" limitation is consistent with congressional intent.

Congress provided for just such a procedure with respect to the termination of plans maintained by more than one employer. In determining the liability of employers under a multiemployer plan, 29 U.S.C. § 1364 (1974) provided that: "(b) The corporation shall determine the liability of *each* such employer and in a manner consistent with section 1362 . . . and the [30 percent] limitation described in section 1362(b)(2) of this title shall be applied *separately* to each employer." (emphasis added).

Clearly, Congress had in mind at the time ERISA was enacted that the "30 percent" limitation of Section 1362(b)(2) would be applied in multiemployer settings to the individual employers comprising the group contributing to the plan. Congress chose not to carry that application back into control group liability under Section 1362 when it came time to allocate liability among the individual members of the control group. The failure of Congress to do so suggests that such an application was not intended. The rationale is quite obvious.

Since the control group is considered a *single* employer, the "30 percent" limitation would be applied only once — to the single employer's (the group's) net worth. For the court in *Ouimet II* to apply that limitation a second time to each member of the control group imposes an additional step in the process of assessing liability not envisioned by Congress or the statute.

The question posed herein is an important question pertaining to the interpretation of ERISA and the application of ERISA liability to bankrupt members of a control group. The question is one bound to arise time and again as plan terminations resulting from or involved in bankruptcy is common and the question is thus worthy of decision by this Court. *See generally, Pension Benefit Guaranty Corporation* v. *Anthony Co.*, 537 F. Supp. 1048 (N.D. Ill. 1982); *Pension Benefit Guaranty Corporation* v. *Dickens*, 535 F.Supp. 922 (W.D. Mich. 1982).

B. *Allocation of Joint and Several Liability Among Members of a Control Group — Contribution.*

The next question posed by *Ouimet II* is the manner of allocating termination liability among the members of the control group. In *Ouimet I*, the First Circuit determined that the control group was *the* employer for purposes of determining the extent of liability under Section 1362, and that *all* members of the group were jointly and severally liable to the PBGC. *Ouimet I*, 630 F.2d at 8-12. ERISA, however, is quiet as to the respective rights and responsibilities of the members of the control group. The master determined that there was a right of contribution between the members of the control group if one member paid more than its just share of the common burden and the First Circuit affirmed that position. *Ouimet II*, ____ F.2d at ____ (App. 20a).

As a result, there is no dispute that a right of contribution exists among members of a control group against which termination liability exists. Because ERISA makes no express provision for such a right, the Court of Appeals necessarily considered such a right to arise by implication, consistent with congressional intent. *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981).

Having fashioned a right to contribution, the issue of allocating liability arises. In *Texas Industries*, this Court recognized that fashioning a just formula for allocating liability presents "difficult issues." 451 U.S. at 637. For the reason that the allocation of liability presents difficult issue which "may result in additional trial and pretrial proceedings" (451 U.S. at 638), an important question of federal law arises which should be decided by this Court, the resolution of which would assure consistency in this difficult area and eschew the "additional . . . proceedings" that may arise if this issue is not now decided.

The First Circuit, in *Ouimet II*, "approve[d] the bankruptcy judge's allocation of termination liability among the solvent members of the Ouimet Group." *Ouimet II*, ____ F.2d at ____ (App. 20a).[5] What was affirmed was the bankruptcy judge's assessment of a *pro rata* share of liability to each member of the group, the result of which was that solvent members were allocated 84 per cent of the liability and the bankrupts the balance.

There is a significant error in this approach, however. A *pro rata* assessment simply means "assessing an equal amount against each participant on the theory that each one is equally liable for the injury caused by collective action." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. at 637.

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[5] As argued in the preceding section, any allocation should be directed to both the solvent and bankrupt members of the group.

The adoption of such a simplistic approach to allocating respective contribution shares of liability ignores the ultimately equitable nature of contribution rights. As this Court recognized in *Texas Industries*, there are numerous approaches to the allocation of contribution shares. What the First Circuit failed to recognize in *Ouimet II* is that "[t]he task of the Court is to choose the [method] most fair to all parties, keeping in mind that equity is the cornerstone of remedial relief." *McLean* v. *Alexander*, 449 F. Supp. 1251, 1268 (D. Del. 1978), *rev'd on other grounds*, 559 F.2d 1190 (3d Cir. 1979). Thus, the court in *McLean* rejected what was, in effect, affirmed in *Ouimet II*, the administratively expedient approach of simply dividing the damages by the number of responsible parties. Moreover, an allocation of liability based upon a comparison of culpability or wrongdoing is inadequate in this type of case, where the members of the control group are not wrongdoers in the tort sense.

The equitable approach consistent with the nature of the contribution remedy for allocating liability is one which measures the benefits received by the members of the control group in relationship to the terminated plan. In that regard, an allocation should be made between direct employers, such as the bankrupts here, and the indirect employers (the petitioners). Such an approach for assessing liabilities was recognized by the Court in *Pension Benefit Guaranty Corporation* v. *Anthony Co.*, *supra*, and would be consistent with the equitable nature of the contribution remedy recognized to exist in ERISA.

C. *Indemnification.*

The bankruptcy judge, while recognizing a right of contribution, rejected the application of the concept of indemnification because he considered the parties not to be primarily

and secondarily liable. In the master's view, both sides could claim to be victims of the 'but for' test." The First Circuit elected not to differentiate between contribution and indemnification, holding instead that "the real problem here is to allocate a liability which has been created by a federal statute." *Ouimet II*, ____ F.2d at ____ (App. 10a). The court then seemingly rejects the indemnification concept because it refuses to accept the petitioners' argument that as between the members of the group, there are two classes of defendants as measured by primary and secondary liability.[6]

When federal law has provided for noncontractual indemnification, such typically arises "where the indemnitee's liability is merely passive; such as constructive, vicarious or derivative, while the indemnitor's liability is active, flowing directly from its own act or omission." *Glover* v. *Johns-Manville Corp.*, 662 F.2d 225, 229 (4th Cir. 1981). The important question to be decided is whether those members of a control group, liable only by operation of Section 1362, are entitled to indemnification from the direct employers.

Petitioners contend that their liability is different from that of Avon and its subsidiary, not just in degree but in character as well (*Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 649 F.2d 1370 [10th Cir. 1979]), and arises only vicariously or derivatively, entitling them to indemnification from the bankrupts' estates. Liability to PBGC arose only as a result of the creation of the pension plan by Avon; its subsequent termination of the plan and the resulting underfunding. Avon was the sole party to the collective bargaining agreement which gave

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[6] While the court chides the group for adopting this perception, it takes the same view when it breaks down the group into two classes, solvent and insolvent employers, and then applies the 30 percent limitation to the individual employers for purposes of determining actual liability.

rise to the liability involved herein and only its employees were covered. The joint and several liability of the indirect employers in Ouimet Group arose not out of any direct relationship to the plan but rather because of their subsequent relationship to the bankrupts and then only by the retroactive operation of ERISA. Only *after* the establishment of Avon's *primary* liability (a necessary condition precedent), was it determined that the Ouimet Group, as a result of their relationship to Avon (*not* the plan) were also liable. Further, that Avon had no positive net worth did not extinguish its primary liability but only rendered the debt uncollectible from it *alone*, absent a positive net worth in the controlled group. Thus, the master's "but for" test, as applied to Avon, is inapplicable. Avon's primary liability existed irrespective of the net worth of the Ouimet Group. Thus, the solvent members of the Ouimet Group stand in the same shoes as an employer which, by operation of law, is vicariously liable for the actions or inactions of its employee — liability that gives rise to a right of full indemnification from the bankrupts' estates. 3 Moore's Federal Practice ¶ 14.03[3]; *Hipp* v. *United States*, 313 F.Supp. 1152 (E.D. N.Y. 1970).

This is simply the application of the rule that indemnification is available "where one has a primary or greater liability or duty which justly requires him to bear the whole burden as between the parties" (*Guillard* v. *Niagara Machine & Tool Works*, 488 F.2d 20, 23 (8th Cir. 1973); *Hartford Acc. & Indem. Co.* v. *R. Hershel Mfg. Co.*, 453 F.Supp. 1375, 1379 [D. N.D. 1978]) and is consistent with noncontractual indemnification which arises by operation of law to prevent a result which is regarded as unjust or unsatisfactory. *Aetna Cas. & Sur. Co.* v. *L.K. Comstock & Co., Inc.*, 488 F.Supp. 732 (D. Nev. 1980). See *Bosse* v. *Litton Unit Handling Systems*, 646

F.2d 689, 693-694 (1st Cir. 1981). The retroactive application of liability to the indirect employers is unjust where the bankrupts' estates have substantial assets. The unfairness is compounded by the decision in *Ouimet II* that no portion of the bankrupts' estates is available to satisfy any portion of the liability.

Because indemnity is the remedy securing the right of a person to recover reimbursement from another for the discharge of a liability which, as *between himself and the other*, should have been discharged by the other (*Hartford Acc. & Indem. Co.* v. *R. Herschel Mfg. Co.*, 453 F.Supp. at 1379), the preservation of that right requires subrogation of PBGC's rights to the Ouimet Group.

Moreover, if the Ouimet Group is required to pay any of the bankrupts' primary liability to PBGC, the solvent members right to indemnification from the bankruptcy estates must be on a priority basis because they are subrogated to the rights and priorities of PBGC against Avon. *Standard Oil Co.* v. *Kurtz*, 330 F.2d 178 (8th Cir. 1964); *Shropshire, Woodliff & Co.* v. *Bush*, 204 U.S. 186 (1907).

D. *Interest.*

The First Circuit held that the parenthetical in 29 U.S.C. § 1368(a) (1976) (providing a lien for the amount of the) "liability (including interest)" constituted a delegation of power to the PBGC by Congress to prescribe the rates and computations of interest. The court then concluded that the PBGC Regulations imposing interest at the variable rates of I.R.C. § 6621(a) (29 C.F.R. § 2622.7(c) (1982)) "implements the statute in a reasonable manner and is entitled to deference . . . and that these rates need not be incorporated into the liability determination." *Ouimet II*, ____ F.2d at ____ (App. 20a).

This result was reached in the face of the following:

1. PBGC's Regulations (29 C.F.R. § 2622.7) state that "interest shall be compounded annually" which is expressly contrary to the provisions of § 26 U.S.C. § 6601(e)(2). Compound interest is now permitted under § 6601(e) from and after January 1, 1983 only.

2. The above Regulations which imposed compound interest by PBGC were first published in the Federal Register on January 28, 1981. Thus, not only is the principal liability imposed by Title IV of ERISA done so retroactively, but in *Ouimet II*, the First Circuit approved PBGC's decision to compound interest retroactively.

3. ERISA does not impose a civil or criminal penalty for late payment of the liability. However, in applying compound interest from 1976 and before the amount of individual liability is actually determined in the case at bar clearly has the effect of a penalty.

4. The Regulations incorporate the fluctuating rates of § 6621 of the Internal Revenue Code with the result that the following annual rates of interest will be applicable for the periods specified below:

March 5, 1976-January 31, 1978	7%
February 1, 1978-January 31, 1980	6%
February 1, 1980-January 31, 1982	12%
February 1, 1982-December 1, 1982	20%
January 1, 1983-June 30, 1983	16%
July 1, 1983-December 31, 1983	11%

5. The interest factor used by PBGC in calculating the deficiency was slightly under 8 percent per annum.

6. The First Circuit held that the 30 percent limitation of liability provided by Section 1362 does not apply to interest with the result that the principal of the underfunding of some

$552,000 is doubled by the addition of interest as calculated by PBGC and such is substantially in excess of the 30 percent of the group's consolidated net worth.

The petitioners respectfully point out that the decision of the First Circuit with respect to the approbation of the PBGC's Regulations imposing compound interest retroactively on the liability is erroneous for the following reasons:

1. ERISA does not by its express terms impose interest on employer liability.

2. Congress did specify interest on late premiums under 29 U.S.C. § 1307(b) as follows:

> If any premium is not paid by the last date prescribed for a payment, interest on the amount of such premium at the rate imposed under § 6601(a) of Title 26 (relating to interest on underpayment, non-payment, or extensions of time for payment of tax) shall be paid for the period from such last date to the date paid.

3. It is clear that Congress knew how to incorporate the fluctuating rates of the Internal Revenue Code and chose not to do so with respect to the liability under Section 1362.

4. The application of the fluctuating rates to Section 6621 of the Internal Revenue Code would generate a "profit" to PBGC since it utilized less than an 8% rate in calculating the liability. That is not the purpose of interest.

5. To hold that the parenthetical in Section 1368(a) was Congress' way of delegating power to PBGC to impose interest suggests Congress did not know how to impose interest; did not know how to incorporate the rates of the Internal Revenue Code or did not think of it; and that interest is such a unique and complex concept that it needs the special expertise of PBGC for its calculation, all of which is absurd.

6. Compound interest for the period January 1, 1976 to January 1, 1983 was specifically prohibited by § 6601(e) of the Internal Revenue Code.

7. Finally, Section 1362, which is entitled "Liability of Employer" the employer's "liability" is limited to 30 percent of its net worth. Section 1368(a), upon which PBGC and the First Circuit relies to hold that "liability" under Section 1362 also includes interest, later reversed themselves and held that such interest is not a part of the "liability" for purposes of the 30 percent limitation. By these gymnastics, PBGC is allowed to have it both ways, that is, to have "liability (including interest)" to mean employer liability includes interest for purposes of adding interest, but interest is excluded and is not considered part of the "liability" for purposes of the 30 percent limitation.

"There is simply no room to imply from that language that a 'single employer' in the 'common control' context is to have a different meaning for *liability* purposes than for the 30 % of *net worth* calculation." *Pension Benefit Guaranty Corporation* v. *Anthony Co.*, 537 F.Supp. at 1052 So too, with interest, there is no room to imply that it is to have a different meaning for liability purposes than for the 30 percent of net worth limitation. See Sen. Report # 93-127, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4862 which states:

> Having determined that participation in the plan termination insurance program was essential for all plans, and that some degree of employer liability was necessary, the question of the degree of such liability becomes important. The committee had concern that if the degree of liability was absolute to the extent of the employer's assets, it might drive some employers to the brink of bankruptcy, impose substantial economic hardship, or discourage the establishment of plans or the reasonable liberalization of benefits.

> Accordingly, the committee endorsed a formula of employer liability which requires the employer to reimburse the plan termination insurance program for the total amount of insurance paid, but in no event greater than 50% of employer's net worth at time of plan termination.

To further evidence congressional concern, the final version of the statute rejected the original 50 percent limitation in favor of a 30 percent limitation. The "challenged Regulation is not a reasonable statutory interpretation unless it harmonizes with the statute's 'origin and purpose' (citation omitted)." *United States* v. *Vogel Fertilizer Co.*, 455 U.S. at 26. PBGC's position as regards interest is clearly not harmonious with ERISA.

E. *The Court of Appeals Misconstrued the Rationale and Holding of this Court in* United States v. Vogel Fertilizer Co., *455 U.S. 12 (1982), in Determining the Composition of the Control Group.*

The stipulated facts show that Emil R. Ouimet owned in his own name in excess of 80 percent of the outstanding shares of Ouimet Corporation, 100 percent of the outstanding shares of Emil R. Ouimet Wareham Trust and 1,188 shares out of 1,500 shares or 79.2 percent of the shares of Ouimet Stay & Leather Company. The First Circuit held that Emil R. Ouimet owned in excess of 80 percent of Ouimet Stay & Leather Company shares by attributing to Emil R. Ouimet the stock owned by his wife and his beneficial interest in his father's estate. Neither the wife nor the father's estate owned shares in the Emil R. Ouimet Wareham Trust or Ouimet Corporation. Thus, the First Circuit included the stock registered in the name of two other persons to satisfy the 80 percent ownership requirement

of Emil R. Ouimet in Ouimet Stay & Leather Company. By the addition of these other shares, the First Circuit concluded that Ouimet Corporation, Ouimet Stay & Leather Company and the Emil R. Ouimet Wareham Trust were all members of the control group since Emil R. Ouimet individually owned 80 percent or more of all three corporations. The First Circuit concluded that *Vogel Fertilizer* did not prevent "attributing" stock from one person to another in order to satisfy the statutory requirements. Petitioners respectfully suggest that this misconstrues and misreads the rationale and holding of this Court in *United States* v. *Vogel Fertilizer Co.*, 455 U.S. 12 (1982). In *Vogel Fertilizer*, this Court held that a brother-sister relationship does not make a corporation a member of a "controlled group of corporations" within Section 1563 of the Internal Revenue Code unless "the same indivisible group of five or fewer persons represent(s) 80 percent of the ownership of each corporation." 455 U.S. at 25.

This Court's holding in *Vogel Fertilizer* is clear as is its rationale. Thus, a person whose stock is included in satisfying the 80 percent test of Section 1563 must own stock in each corporation alleged to be a member of the control group. This would include stock added by "attribution" or by any other reason. Otherwise, the rationale and holding of this Court in the *Vogel Fertilizer* case is easily circumvented. This Court clearly stated in *Vogel Fertilizer* the need that stock ownership be direct and not indirect as follows:

> Congress purposefully substituted the mechanical formula of § 1563(a)(2) for the subjective case-by-case, analysis that had previously prevailed. Inherent in such an objective test is a sharp dividing line that is crossed by incremental changes in ownership. Moreover, it is obvious that a shareholder would not buy a small amount of stock in order to create a controlled group, since it is to

> the taxpayer's advantage not to be part of such a group. Finally, a person's "mere" ownership of one share of stock plays an important role in the operation of the test. It insures that each of the "5 or fewer" shareholders representing the bulk of the financial interest of the corporations actually knows of the other corporations within the putative brother-sister controlled group. Under this construction of the statute, controlled-group membership cannot catch such a shareholder by surprise, as it could under the Commissioner's construction.

455 U.S. at 34, 35.

Thus, if it is necessary to add stock of any individual to raise the stock ownership of Emil R. Ouimet to 80 percent or more of Ouimet Stay & Leather Company then such individuals must also own stock in the other corporations to be included in the group. Such are not the facts.

Conclusion.

For the foregoing reasons, petitioners pray that this Court allow a writ of certiorari to issue to the United States Court of Appeals for the First Circuit for purposes of reviewing and reversing the decision of that court.

Respectfully submitted,

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Appendix.

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United States Court of Appeals for the First Circuit.

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v.
OUIMET CORPORATION, ET AL.,
DEFENDANTS, APPELLANTS.

No. 82-1652.

PENSION BENEFIT GUARANTY CORPORATION,
PLAINTIFF, APPELLEE,
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HERBERT C. KAHN, TRUSTEE IN BANKRUPTCY OF TENN-ERO CORPORATION AND IN AVON SOLE COMPANY,
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No. 82-1653.

PENSION BENEFIT GUARANTY CORPORATION,
PLAINTIFF, APPELLANT,
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OUIMET CORPORATION, ET AL.,
DEFENDANTS, APPELLEES.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

[HON. JOSEPH L. TAURO, *U.S. District Judge*]

Before

BOWNES AND BREYER, *Circuit Judges*,
AND WYZANSKI,* *Senior District Judge*.

Richard G. Maloney, with whom *Burton L. Williams*, and *Maloney, Williams & Baer, P.C.* were on brief, for Ouimet Corporation, et al.

Frederick G. Fisher, Jr., with whom *Paul P. Daley, Hale and Dorr, Sidney Werlin, Richard Zinner, Friedman & Atherton, Bernard A. Riemer*, and *Riemer and Braunstein* were on brief, for Herbert C. Kahn.

Bernard P. Klein, Senior Attorney, with whom *Henry Rose*, General Counsel, *Mitchell L. Strickler*, Deputy General Counsel, *Baruch A. Fellner*, Associate General Counsel, and *James N. Dulcan*, Assistant General Counsel, were on brief, for Pension Benefit Guaranty Corporation.

June 9, 1983

BOWENS, *Circuit Judge*. This case is a sequel to *Pension Benefit Guaranty Corp.* v. *Ouimet Corp.*, 470 F. Supp. 945 (D. Mass. 1979), *aff'd.*, 630 F.2d 4 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981). In that case the district court held that the Employee Retirement Income Security Act (ERISA) authorizes the Pension Benefit Guaranty Corporation (PBGC) to impose liability for a pension plan termination jointly and severally on members of a commonly controlled group of businesses, and not just on the member that had established and contributed to the plan. We affirmed on somewhat different grounds and the case was remanded to the bankruptcy judge sitting as a master pursuant to Federal Rule of Civil Procedure 53 for a determination of the controlled group's net worth. The bankruptcy judge's net worth determination and ultimate allocation of liability among members of the commonly controlled group on remand have been affirmed by a district court order dated July 14, 1982, from which all of the parties now appeal. We find this allocation of liability to be erroneous as a matter of law and remand the

*Of the District of Massachusetts, sitting by designation.

case to the district court for determinations consistent with this opinion.

I. *Facts and Prior Proceedings*

As explained more fully in our first opinion, *Ouimet*, 630 F.2d at 6-7, this case concerns a group of business entities (the Ouimet Group) primarily owned, either directly or indirectly, by Emil R. Ouimet.[1] He, or in some instances his son, also served as president of each of these entities. The case commenced with the bankruptcy of two members of the Ouimet Group, Avon Corporation (Avon) and its wholly-owned subsidiary, Tenn-ERO.[2]

Avon became a member of the Ouimet Group in 1968 when its stock was purchased by the Ouimet Corporation. Nine years earlier Avon had established a pension plan for its hourly workers pursuant to a collective bargaining agreement. This plan gave Avon the right to "amend, modify, suspend or terminate [it]" and limited any benefits payable upon termination to "the assets then remaining in the Trust Fund." Although Avon had made all actuarially required contributions, the plan was at all times underfunded because these contributions were insufficient to provide for all plan benefits.[3] This underfunding totalled $92,000 at the time Avon became a member of the Ouimet Group and $552,339.64 when Avon ceased operations in 1975.

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[1] For a diagram of the relationship of these businesses, see *Ouimet*, 470 F.Supp. at 947 n.1.

[2] For all practical purposes these two entities were one and the same; they have been treated as such throughout the proceedings involved in this case.

[3] More specifically, the underfunding existed because (1) the plan gave credit for past years of service without requiring immediate contributions to fund these credits, (2) Ouimet negotiated several benefit increases but failed to fund them with current contributions, and (3) the value of fund investments declined during the years immediately before the plan's termination. *Ouimet*, 630 F.2d at 7.

In 1974 Congress established a system of pension plan termination insurance in Title IV of ERISA to guarantee the vested benefits of workers covered by defined benefits plans.[4] PBGC, the corporation created to administer the insurance program, in essence pays employees' vested benefits to the extent that the terminated pension plan's assets are insufficient to cover them. PBGC finances benefit payments by collecting insurance premiums from administrators of covered plans, 29 U.S.C. § 1301(a)(1) (Supp. V 1981), and by imposing reimbursement liability on the employer that terminated the plan, 29 U.S.C. § 1362 (1976 & Supp. V 1981). The employer liability provided for by section 1362 is limited to thirty percent of the employer's net worth.[5]. In our earlier opinion we held that, due to the plain meaning of the statutory language in 29 U.S.C. § 1301(b) (1976),[6] the Ouimet Group con-

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[4] For the current codification of this insurance system, see 29 U.S.C §§ 1301-1461 (1976 & Supp. V 1981).

[5] The statute sets out the amount of liability as follows:

> Any employer to which this section applies shall be liable to the corporation, in an amount equal to the lesser of—
>
> (1) the excess of—
>
> (A) the current value of the plan's benefits guaranteed under this subchapter on the date of termination over
>
> (B) the current value of the plan's assets allocable to such benefits on the date of termination, or
>
> (2) 30 percent of the net worth of the employer determined as of a day, chosen by the corporation but not more than 120 days prior to the date of termination, computed without regard to any liability under this section.

29 U.S.C. § 1362(b) (1976).

[6] The relevant language in this section, which has remained unchanged by subsequent amendments to the section, is as follows:

> For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses

stituted one employer for the purpose of employer liability under section 1362. *Ouimet*, 630 F.2d at 11-12. Thus, in determining the reimbursement liability resulting from Avon's plan termination the net worth ceiling was to be measured by the aggregate net worth of the Ouimet Group and the various members of the Group were to be held jointly and severally liable to PBGC.

On remand the bankruptcy judge accepted PBGC's determinations with respect to the valuation date[7] and method of valuing the Ouimet Group's net worth,[8] and found that the Group's net worth was sufficiently large that the thirty percent provision did not operate to reduce the $552,339.64 liability amount. He then accepted PBGC's claim for interest on the liability from thirty days after the initial demand for payment up to the payment date at the rates provided under I.R.C. § 6621, but disallowed the imposition of interest against the bankrupt companies, Avon and Tenn-ERO. In determining the allocation of liability to each member of the Ouimet Group the bankruptcy judge noted that ERISA provides no explicit guidance on the issue and then attempted to

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as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of title 26.

29 U.S.C. § 1301(b)(1) (Supp. V 1981).

[7] The statute requires PBGC to choose a valuation date that is not more than 120 days before the termination date. *See supra* note 5 (text of provision). PBGC selected December 31, 1974, as the valuation date in this case.

[8] In relevant part 29 U.S.C. § 1362(c) (1976 & Supp. V 1981) provides that, for the purposes of computing an employer's liability, net worth is "determined on whatever basis best reflects, in the determination of the corporation, the current status of the employer's operations and prospects at the time chosen for determining the net worth of the employer . . . ." In this instance PBGC concluded that a fair market valuation was the most appropriate measure of net worth.

make the allocation in a manner consistent with the congressional intent behind the statute. The judge acknowledged that the thirty percent of net worth limitation suggests that the bankrupts, having no net worth, could not be liable, but rejected this suggestion apparently because ERISA give PBGC's liability claim against an employer a priority status in bankruptcy proceedings. He finally arrived at an allocation based upon the thirty percent of net worth limitation; for the bankrupts, however, he substituted thirty percent of asset value for thirty percent of net worth. Based on ratios arrived at by dividing thirty percent of each member's net worth and thirty percent of the bankrupts' asset values by the total of thirty percent of the Group's aggregate net worth plus thirty percent of the bankrupts' asset values, the judge allocated liability as follows:

Ouimet Corporation	$287,497
Ouimet Stay & Leather Company	95,832
Emil R. Ouimet Wareham Trust	90,508
Avon Sole Co. & Tenn-ERO	78,502
Total Liability to PBGC	$552,339

The district court affirmed the bankruptcy judge's judgment and memorandum in their entirety. On appeal the Ouimet Group advances several theories designed to reduce the termination liability or interest imposed on its remaining solvent members; some of these reductions would be at the expense of the bankruptcy estates of Avon and Tenn-ERO. PBGC and the Trustee in Bankruptcy have responded where appropriate and PBGC also has asserted that the court below erred in not allowing interest on the entire amount of the liability.

II. *Reduction of Liability for Benefits Accrued Before Avon's Membership in the Ouimet Group*

The Ouimet Group's first argument is that the joint and several liability of its members should be reduced by $92,000, the unfunded liability for vested benefits which had accrued under the pension plan before Avon became a member of the Group. This contention stems from our earlier holding that ERISA's retroactive imposition of joint and several liability on Group members other than Avon was justified by virtue of their membership in the Group. The Group maintains that it follows from this that ERISA could constitutionally impose retroactive liability on other members only for the unfunded benefits attributable to the period during which Avon was a member.

PBGC responds to this argument primarily by stressing that the issue has already been litigated by the parties and decided by this court when we upheld the retroactive application of ERISA's termination liability provisions based upon the reasoning of *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979) (retroactivity upheld on statutory and constitutional grounds), *aff'd*, 446 U.S. 359 (1980) (addressing the statutory question only). Indeed, the Ouimet Group's current argument is strikingly familiar and relies on the same cases cited by it earlier — *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978), and *Railroad Retirement Board* v. *Alton Railroad*, 295 U.S. 330 (1935). We hesitate to dismiss the Group's argument summarily, however, because it does contain some nuance of focusing on the liability accrued prior to Avon's membership in the Ouimet Group. As PBGC acknowledges in its brief, the Ouimet Group did not specifically argue this point earlier.

Instead of relying upon cases that we distinguished in our earlier opinion, the Ouimet Group perhaps should have cited

Pension Benefit Guaranty Corp. v. *Anthony Co.*, 537 F. Supp. 1048 (N.D. Ill. 1982), in advancing its current point. The court in *Anthony* considered the constitutionality of imposing employer liability on a parent whose subsidiary terminated a pension plan; the parent had acquired the subsidiary after the plan was established and before ERISA's effective date. The court distinguished *Nachman* as upholding the statute's retroactive application to *direct* employers. It held that liability could constitutionally be imposed on the direct employer's *parent* only to a limited extent, concluding that it would be rational in due process terms to hold "the acquiring parent accountable for underfunding to the extent of any direct financial benefits it derived from the subsidiary during its affiliation." *Anthony*, 537 F. Supp. at 1056 (footnote omitted). The court suggested that the parent could be held liable for such items as dividends it received from the subsidiary or income tax savings realized from deductions attributable to the subsidiary. By implication *Anthony* suggests that it would violate due process to hold the parent liable for unfunded benefits attributable to the period before it acquired the subsidiary because the parent would have received no financial benefits relating to this period.

We do not agree that rationality in due process terms requires a dollar by dollar accounting of the financial benefits controlled group members have realized as a result of their affiliation with the terminating employer. The mere fact that such benefits typically accrue in the controlled group setting is sufficient to support a conclusion that Congress acted rationally and not arbitrarily in drafting ERISA to impose retroactive liability on controlled group members. The circumstances surrounding the Ouimet Group amply demonstrate this. As we noted in our first opinion, Ouimet had agreed to benefit increases under the plan which contributed to its underfunding and the Ouimet Group realized tax benefits on the Avon plan

contributions. *Ouimet*, 630 F.2d at 12. The analysis in *Anthony* ignored the realities of business affiliation, such as that a parent does not have to actually receive dividend payments to benefit from its subsidiary's successful operations.

It does not require a quantum leap for us now to hold explicitly that imposing on the entire Group the $92,000 liability relating to the period before Avon was acquired does not violate due process. The Ouimet Group does not have an indefeasible reliance interest here because it acquired Avon "with full knowledge of the plan and its funding requirements." *Ouimet*, 630 F.2d at 12. Presumably the price at which Ouimet acquired Avon reflected the plan's funding inadequacies up to that date — such as for past service costs — and thus Ouimet stepped into the shoes of Avon with respect to the benefits and burdens of the plan; certainly in most business acquisitions involving the purchase of stock this would be the case. More importantly, the Ouimet Group's argument here runs counter to the essence of our first holding, that in enacting ERISA's termination liability provisions Congress treated entities under common control as one employer. The statute places the Ouimet Group in the shoes of Avon regardless of the specifics of Ouimet's acquisition of that company. This approach is rationally related to ERISA's objectives of protecting employees' retirement benefits while not creating disincentives to the adoption or liberalization of retirement plans. *See* Comment, *Extending Liability for Pension Plan Terminations to Controlled Group Members*: Pension Benefit Guaranty Corp. v. Ouimet Corp., 61 B.U.L. Rev. 447, 489-502 (1981). Much of the analysis in *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 592 F.2d 947, concerning direct employers is pertinent here and supports the conclusion that due process does not require reducing the Ouimet Group's liability by the amount of vested benefits accrued before Avon became a member.

III. *Reduction of Liability Under Theories of Indemnity and Contribution*

The Ouimet Group's indemnity and contribution arguments reflect the same misperception of our earlier holding that commonly controlled entities constitute one employer for the purpose of termination liability. Underlying both of its contentions is the Group's continued assertion that there are two classes of defendants to PBGC's claims in this case, the direct employers of the plan participants and the remaining members of the Group, and that the former class has primary liability while the latter is merely secondarily liable. Thus, the Ouimet Group argues that it is entitled to indemnification to the full extent of the $386,515.32 in the bankrupts' estates. Under what it refers to as a contribution theory the Group offers two other possible allocations of liability. First, it maintains that the bankrupts' estates should be applied first to the liability and that the Group should be jointly and severally liable for the balance. It appears that this approach would result in the same allocation as the indemnity theory: the bankrupts' estates would be fully exhausted before the solvent companies could be held liable. In the alternative the Group argues for an allocation based on the comparative benefits yielded by the plan. It measures the benefits a business realizes from a pension plan by the number of months during which that business was connected with the plan. Given that the plan existed for 190 months and that Avon became affiliated with the Group after 112 of these months, the Group suggests that 112/190 of the liability be allocated to Avon and the remainder to the Group.

As often happens, these arguments confuse the concepts of indemnification and contribution. *See* W. Prosser, *Law of Torts* 310 (4th ed. 1971). To the extent that the Group seeks an allocation which requires each entity to pay its proportionate share of the liability it is requesting a right of contribution.

See id. The notions of primary and secondary liability which underlie the Group's claims, however, suggest that it is requesting indemnification. In any event, the real problem here is to allocate a liability which has been created by a federal statute. We find guidance in solving this problem in two recent Supreme Court cases — *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981), and *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77 (1981). Not surprisingly, these cases suggest that we first determine if the statute, either expressly or by implication, provides the method of allocation. *See Texas Industries*, 451 U.S. at 638 (A right to contribution under the antitrust laws may arise in one of the following ways: "first, through the affirmative creation of a right of action by Congress, either expressly or by clear implication; or, second, through the power of the federal courts to fashion a federal common law of contribution."); *Northwest Airlines*, 451 U.S. at 90-91 (similar statement with respect to the question of a right to contribution under the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964). Factors relevant to the analysis include statutory language, legislative history, and policy considerations. *Id.* at 89, 95.

The allocation to be made in this case is really one between the solvent members of the Ouimet Group and the creditors of the bankrupt companies, Avon and Tenn-ERO. The creditors' claims significantly exceed the assets available in the bankruptcy estates and to the extent that assets from these estates are used to satisfy PBGC's claim there will be an even smaller amount available to creditors. Hints of a solution to this allocation problem along with lines suggested by the Ouimet Group can be found in our first *Ouimet* opinion as well as in that of the district court. In an introductory discussion of the controlled group liability issue we stated that if the statute limited liability to the direct employer, Avon, then

"PBGC [would] recover[] nothing and a dividend [would] be paid to the creditors." *Ouimet*, 630 F.2d at 6. If the statute instead was construed to extend liability to other members of the Ouimet Group, we foresaw that it would be "probable that PBGC will receive all of the bankrupts' assets with the creditors receiving nothing." *Id.* Similarly, the district court speculated that "[b]y applying the net worth of the entire controlled group, the bankruptcy estate will probably be exhausted, and the unsecured creditors will receive little or no dividend." *Ouimet*, 470 F. Supp. at 953 n.19.

Now with the issue squarely before us, we do not think that the statutory provisions treating commonly controlled businesses as one employer should operate — by using the entire Group's net worth in computing the thirty percent ceiling — to increase the liability amount and then allow the Group to pass as much of this increase as possible along to creditors of the bankrupts. It is true that the statute does not explicitly allocate liability among controlled group members which, under section 1301(b), are to be treated as a single employer. *Ouimet*, 470 F. Supp. at 953-54 n.20. It is also true that when Congress wanted to allocate liability among employers participating in plans other than single-employer plans it did so explicitly. *See, e.g.*, 29 U.S.C. § 1363 (1976 & Supp. V 1981) (providing a specific formula for allocating liability to the withdrawing employer and stating that this formula may be overridden by an "indemnity agreement in effect among all other employers under the plan"). These facts, however, do not negate the conclusion that allocation of the termination liability in this case to the creditors of Avon and Tenn-ERO cuts against the language and policies of the statutory scheme.

The thirty percent of net worth limitation clearly appears to eliminate the bankruptcy estates and a source of payment to PBGC because the estates have zero, actually negative, net worth. The bankruptcy judge recognized this but apparently

could not reconcile it with the special priority status the PBGC claim receives in bankruptcy. The simple answer is that the provisions of 29 U.S.C. § 1368 (1976 & Supp. V 1981), which in essence create a lien similar to a tax lien, evidence the intent of Congress that as between PBGC and the bankrupt employer's creditors the termination liability should be absorbed by the creditors. These provisions do not support the conclusion that as between controlled affiliates who are to be treated as a single employer and the direct employer's creditors the loss is to be absorbed by the creditors.

Congress' intent in enacting the net worth ceiling was to avoid imposing extreme economic hardship on employers and driving them to the brink of bankruptcy. Concomitantly, Congress also sought to avoid discouraging the establishment or liberalization of pension plans. H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4654; S. Rep. No. 127, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4838, 4862. The seriousness with which Congress considered these objectives is demonstrated by the fact that the conference committee reduced the ceiling to thirty percent of net worth from the fifty percent originally proposed in the House and Senate bills. There is simply no provision in the statute which authorizes PBGC to impose termination liability on an insolvent entity. The bankruptcy judge's approach of substituting assets for net worth reads more into the statute than we are willing to accept.

Furthermore, the conclusion that the solvent members of the Ouimet Group, and not Avon's creditors, should bear responsibility for the liability to PBGC follows from the objectives of imposing termination liability. These objectives, to deter employers from making unrealistic promises to employees and to protect against abuse of the termination insurance program, are illuminated by the following passage from the legislative history:

> Concern was expressed to the committee that in the absence of appropriate safeguards under an insurance system, an employer might establish or amend a plan to provide substantial benefits with the realization that its funding may be inadequate to pay the benefits called for. Such an employer might, it was argued, rely on the insurance as the backup which enables it to be more generous in promising pension benefits to meet labor demands than would be the case if it knew that the benefits would have to be paid for entirely out of the assets of the employer.

S. Rep. No. 383, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4890, 4971. Instead of relying on the insurance program as a backup, the Ouimet Group is trying to rely as much as possible on Avon's creditors. This conflicts with the congressional intent of holding employers accountable for the pension benefits they promise to ensure that employees can safely rely on these promises in their retirement planning. This type of accountability is central to ERISA's primary goal of protecting employees' benefits. *See A-T-O, Inc.* v. *Pension Benefit Guaranty Corp.*, 634 F.2d 1013, 1023 (6th Cir. 1980); *see also* Comment, *Extending ERISA Liability for Pension Plan Terminations to Controlled Group Members*: Pension Benefit Guaranty Corp. v. Ouimet Corp., 61 B.U.L. Rev. 477, 489-502 (1981) (maintaining that holding controlled group members liable for plan terminations fosters the statute's insurance objective and that such seemingly harsh treatment of employers does not produce the disincentives Congress sought to avoid). As we have indicated, the Ouimet Group participated in labor negotiations that resulted in promises of benefit increases and benefitted from Avon's plan at the very least to the extent of deductions on its consolidated

income tax returns. Under these circumstances we think the statute clearly requires that PBGC's claim be satisfied out of the Group's net worth, leaving the entire amount of the bankrupts' estates for the satisfaction of creditors.

On the surface this result may appear to disregard unduly the legal separateness of the corporate entities involved.[9] There is precedent, however, for piercing the corporate veil in bankruptcy situations. Under its general equitable powers a bankruptcy court may "substantially consolidate" the assets and liabilities of various entities. Substantial consolidations will usually, but not always, involve only debtors and be granted if absolutely necessary for achieving reorganization or protecting creditors' economic interests. *See generally* 5 *Collier on Bankruptcy* ¶ 1100.06 (15th ed. 1979). Some of the facts a court will look for in deciding whether to grant a substantive consolidation include the parent owning a majority of the subsidiary's stock, the entities having common officers or directors, the subsidiary being grossly undercapitalized, the subsidiary transacting business solely with the parent, and both entities disregarding the legal requirements of the subsidiary as a separate corporation. *Id.* at 1100-35 (quoting *Fish* v. *East*, 114 F.2d 177, 191 (10th Cir. 1940)); *cf. DeWitt Truck Brokers, Inc.* v. *W. Ray Flemming Fruit Co.*, 540 F.2d 681, 684-90 (4th Cir. 1976) (citing similar factors in concluding that officer/shareholder of indebted corporation could be held individually liable on the corporation's debt).

There is no need to show that any or all of these factors are present to justify holding the solvent members of the Ouimet

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[9] Perhaps this explains why the Trustee in Bankruptcy failed to press for this result on appeal and instead acceded to the allocation of the bankruptcy judge. The Trustee had argued below that it followed from the thirty percent of net worth ceiling that the solvent members of the Group should pay the liability in proportion to their net worth and that the bankrupts should bear no liability.

Group responsible for the entire liability in this case. Avon's corporate veil was, in effect, pierced by Congress when it enacted the termination liability provisions of ERISA. The corporate form is a creation of state law and states may impose stringent limitations on attempts to disregard it; the factors courts consider in deciding whether to grant substantive consolidations reflect such limitations. These limitations, however, do not constrict a federal statute regulating interstate commerce for the purpose of effectuating certain social policies. *See Sebastopol Meat Co.* v. *Secretary of Agriculture*, 440 F.2d 983, 985 (9th Cir. 1971) (state limitations on the "alter ego" doctrine need not be accepted in an agency's application of federal regulatory statutes); *Corn Products Refining Co.* v. *Benson*, 232 F.2d 554, 565 (2d Cir. 1956) (existence of separate corporate entity may be disregarded when necessary to further the purpose of a federal regulatory statute). Thus, concerns for corporate separateness are secondary to what we view as the mandate of ERISA in this case.

IV. *Composition of the Ouimet Group*

The Ouimet Group next argues that the Supreme Court's holding in *United States* v. *Vogel Fertilizer Co.*, 455 U.S. 16 (1982), has altered the composition of the controlled group as originally determined by the district court in its first opinion. Specifically, the Group maintains that the Emil R. Ouimet Wareham Trust (Trust), which had been included in the controlled group because of its brother-sister relationship with other Ouimet companies, *Ouimet*, 470 F. Supp. 947-49, should no longer be included in the Group. The exclusion of Trust and its net worth would reduce the Group's termination liability by at least $6,000.

I.R.C. § 1563(a)(2), in pertinent part, defines a brother-sister relationship as existing between two corporations when five or fewer persons own at least eighty percent of the voting

power of each corporation.[10] In invalidating a Treasury regulation promulgated under this section the Court in *Vogel Fertilizer* held that each person whose stock is considered in applying the eighty percent test must own at least one share of stock in each corporation. *Vogel Fertilizer*, 455 U.S. at 22-35. The Ouimet Group maintains that this requirement has not been met with respect to Trust because Emil Ouimet, who is the sole owner of Trust, owns just under eighty percent of Ouimet Stay & Leather Company, a corporation which along with Ouimet Corporation had originally been held to have had a brother-sister relationship with Trust.

This argument misreads *Vogel Fertilizer*. Under that case's holding, if Emil Ouimet did indeed own less than eighty percent of Ouimet Stay & Leather then *that* company would not be a member of the controlled group. Trust and Ouimet Corporation would remain in a brother-sister relationship as defined in *Vogel Fertilizer* because Emil Ouimet owned at least eighty percent of each of them. More importantly, we find that the controlled group as originally defined by the district court satisfies the *Vogel Fertilizer* requirement because Emil Ouimet in fact owned at least eighty percent of Ouimet Stay & Leather.

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[10] The text of I.R.C. § 1563(a)(2) is as follows:

> Brother-sister controlled group
>
> Two or more corporations if 5 or fewer persons who are individuals, estates, or trusts own (within the meaning of subsection (d)(2)) stock possessing —
>
> (A) at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of the stock of each corporation, and
>
> (B) more than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of stock of each corporation, taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation.

The principles of I.R.C. § 1563(a)(2) are relevant to controlled group plan termination liability because ERISA defines an employer in terms of the regulations promulgated under I.R.C. § 414(c). 29 U.S.C. § 1301(b)(1) (Supp. V 1981); *see supra* note 6 (text of provision). I.R.C. § 414(c) and the related regulations define controlled groups of businesses using the principles of the I.R.C. § 1563 definitions. *See generally* Comment, *Extending ERISA Liability for Pension Plan Terminations to Controlled Group Members*: Pension Benefit Guaranty Corp. v. Ouimet Corp., 61 B.U.L. Rev. 477, 491-02 (1981) (suggesting that the difference between section 1563 and section 414 is that the latter encompasses unincorporated as well as incorporated entities in the controlled group definitions and thus includes Trust). The family attribution rules set forth in the section 414(c) regulations operate to increase Emil Ouimet's ownership percentage in Ouimet Stay & Leather to over eighty percent.[11] Under Temporary Treas. Reg. § 11.414(c)-4(b)(5) (1975), Emil Ouimet is deemed to own his wife's six shares and under Temporary Treas. Reg. § 11.414(c)-4(b)(3) (1975), he is deemed to own almost seven shares from his father's estate. These shares are sufficient to push his ownership interest in Ouimet Stay & Leather to over eighty percent without even considering the indications in the record that Emil Ouimet actually owns some more shares which are in the names of others. Thus, the same shareholder owns at least eighty percent of Trust, Ouimet Stay & Leather, and Ouimet Corporation and these entities are in a brother-

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[11] We reject the Ouimet Group's contention that under *Vogel Fertilizer* the family attribution rules can only apply to stock owned by persons who own stock of each of the entities under consideration. The attribution rules set out in I.R.C. § 1563(d) & (e) clearly do not include such a requirement. *Vogel Fertilizer* invalidated Treasury regulations which were inconsistent with other portions of § 1563 and clearly had no effect on that section's attribution provisions.

sister relationship as defined in *Vogel Fertilizer*. Therefore, for the purpose of imposing terminating liability the Ouimet Group includes Trust and remains as originally defined by the district court.

V. *Interest Accrued During the Period the Liability Remains Unpaid*

The district court affirmed the bankruptcy judge's conclusion that interest should not accrue on that portion of the Ouimet Group's termination liability allocated to the bankrupts. It follows from our holding here that interest should accrue on the entire amount of the liability because no amount is to be allocated to the bankrupts.

The Ouimet Group raises several points with respect to the amount of interest which should attach to its liability. First it argues that the statute does not provide for the imposition of interest, and that if interest is imposed it should not accrue until after this court issues its opinion and the amount of liability is conclusively determined. We think the statute clearly provides that PBGC may impose interest for an employer's delay in satisfying its claim. *See* 29 U.S.C. § 1368(a) (1976) (providing for a lien in the amount of an employer's "liability (*including interest*)" (emphasis added)); *see also Ludlow Industries* v. *Pension Benefit Guaranty Corp.*, 524 F. Supp. 155, 158 (N.D. Ill. 1981). This interest logically would begin to accrue on the plan termination date, the date on which the employer's liability arises. *Cf.* 29 U.S.C. § 1368(b) (1976) (providing that the lien imposed when an employer neglects or refuses to pay arises on the plan termination date); 29 U.S.C. § 1362(b) (1976) (providing for computation of termination liability as of the termination date). Accruing interest as of the termination date is consistent with the idea that imposing interest will encourage prompt settlement of PBGC's claims as well as compensate it for the time value of money foregone

during any period of delay in payment. We note that PBGC's regulations also encourage PBGC itself to facilitate a rapid determination and settlement of liability by imposing the same interest on PBGC for any overpayments made to it by the employer. 29 C.F.R. § 2622.7(b) (1982). The Ouimet Group has little room to complain because it has already been granted a one year delay beyond the termination date for the commencement of interest.

The Ouimet Group next cites *Ludlow Industries*, 524 F. Supp. 155, for the proposition that if interest accrues for its delay in payment, then for purposes of consistency the interest rate should be correlated with the factor used to discount the pension plan's vested nonforfeitable benefits to present value in computing the termination liability. Thus, the Group maintains that if we approve PBGC's imposition of interest for payment delays at short-term rates the termination liability should be recomputed using these same rates in discounting benefits. PBGC's regulations have adopted the variable short-term rates provided in I.R.C. § 6621(a) for accruing interest on payment delays. 29 C.F.R. § 2622.7(c) (1982). Short-term rates are appropriate here on the theory that any delay in payment will not extend indefinitely. In effect, PBGC or the employer is being compensated for the short-term use of its money. On the other hand, long-term rates — which were used in determining the liability due at the termination of Avon's plan — are appropriate in making the termination liability calculation because this involves discounting pension benefits that are scheduled to be received by employees over many years. There is no reason for the rates in these two calculations to be the same and we reject the Group's argument that if we uphold, as we have, short-term interests rates for payment delay the termination liability amount must be redetermined to reflect discounting at the short-term rates. We find that PBGC's regulation imposing interest at the

I.R.C. § 6621(a) rates from the termination date implements the statute in a reasonable manner and is entitled to deference, *see Vogel Fertilizer*, 455 U.S. at 24, and that these rates need not be incorporated into the liability determination.

Finally, we have considered and find no merit in the Ouimet Groups's other arguments with respect to interest, including the contention that the interest imposed pursuant to 29 C.F.R. § 2622.7(c) (1982) is a component of an employer's termination liability and the total amount of liability and interest must be limited to thirty percent of net worth. Section 1362, which includes the thirty percent ceiling, clearly pertains solely to an employer's liability for the current value of the plan's unfunded vested benefits. *See* 29 U.S.C. § 1362 (1976 & Supp. V 1981). This amount, which is determined as of the termination date, is limited to thirty percent of net worth. Section 1368, which indicates that PBGC may impose an interest charge, addresses entirely different issues relating to satisfaction of PBGC's claim that arise after the termination date. This straightforward reading of the statutory language does not eviscerate the net worth limitation when, as in this case, it exposes employers to potential interest charges which increase the total amount due to substantially higher than thirty percent of net worth because an employer may avoid such charges by paying its termination liability promptly.

In conclusion, we approve the bankruptcy judge's allocation of termination liability among the solvent members of the Ouimet Group according to ratios using thirty percent of their net worth amounts. This case must be remanded, however, to allocate to these solvent companies the liability originally allocated to the bankrupts. Interest on the reallocated liabilities should be computed in a manner consistent with this opinion.

Remanded.

United States Court of Appeals for the First Circuit.

No. 82-1651.

PENSION BENEFIT GUARANTY CORPORATION,
PLAINTIFF, APPELLEE,
v.
OUIMET CORPORATION, ET AL.,
DEFENDANTS, APPELLANTS.

No. 82-1652.

PENSION BENEFIT GUARANTY CORPORATION,
PLAINTIFF, APPELLEE,
v.
OUIMET CORPORATION, ET AL.,
DEFENDANTS, APPELLEES,
v.
HERBERT C. KAHN, TRUSTEE IN BANKRUPTCY OF TENN-ERO CORPORATION AND IN AVON SOLE COMPANY,
DEBTORS, APPELLANTS.

No. 82-1653.

PENSION BENEFIT GUARANTY CORPORATION,
PLAINTIFF, APPELLANT,
v.
OUIMET CORPORATION, ET AL.,
DEFENDANTS, APPELLEES.

JUDGMENT

Entered: June 9, 1983

These causes came on to be heard on appeals from the United States District Court for the District of Massachusetts, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged, and decreed as follows: The judgment of the District Court is vacated and the cause is remanded to that Court for further proceedings consistent with the opinion filed this date.

No costs.

By the Court:
Francis P. Scigliano
Clerk.

No. 83-397

Office-Supreme Court, U.S.
FILED
OCT 12 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

OUIMET CORPORATION, OUIMET STAY & LEATHER COMPANY, OUIMET WELTING COMPANY, and EMIL R. OUIMET WAREHAM TRUST,

Petitioners,

v.

PENSION BENEFIT GUARANTY CORPORATION, AVON SOLE COMPANY, TENN-ERO CORPORATION, and HERBERT KAHN, TRUSTEES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR RESPONDENT PENSION BENEFIT GUARANTY CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether all members of a controlled group may be held liable under Title IV of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), for the underfunding of a pension plan sponsored by one of the members, including underfunding which existed when the sponsor joined the controlled group six and one-half years prior to the termination of the plan.

2. Whether the amount of termination liability to the Pension Benefit Guaranty Corporation ("PBGC") to be borne by the solvent and bankrupt members of a controlled group, all of whom are jointly and severally liable under ERISA, may be allocated by the court of appeals so as to require the solvent entities to pay the total amount to the PBGC.

3. Whether the PBGC was entitled to assess compound interest, at market rates, on plan-termination liability which had been unpaid since 1975.

4. Whether Emil Ouimet held at least 80 percent of the ownership of Ouimet Stay & Leather Company for purposes of determining membership in the controlled group.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-397

OUIMET CORPORATION, OUIMET STAY & LEATHER COMPANY, OUIMET WELTING COMPANY, and EMIL R. OUIMET WAREHAM TRUST,

Petitioners,

v.

PENSION BENEFIT GUARANTY CORPORATION, AVON SOLE COMPANY, TENN-ERO CORPORATION, and HERBERT KAHN, TRUSTEE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF FOR RESPONDENT PENSION BENEFIT GUARANTY CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 711 F.2d 1085. The district court's order summarily affirming the decision of the master is not reported. Earlier decisions of the district court and of the court of appeals in this litigation are reported at 470 F. Supp. 945 and 630 F.2d 4. This Court's earlier denial of certiorari is reported at 450 U.S. 914.

JURISDICTION

The decision of the court of appeals was issued on June 9, 1983. The petition for a writ of certiorari was

filed on September 7, 1983. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent sections of Title IV of ERISA involved in this case appear in the Appendix, pp. 1a-3a, *infra*.

STATEMENT

This case involves the termination of an underfunded pension plan sponsored by a bankrupt member of a group of trades or businesses under common control within the meaning of 29 U.S.C. § 1301(b). Title IV of ERISA imposes joint and several liability, within statutory limitations, upon all members of the controlled group for the underfunding of such a pension plan. Petitioners are the solvent members of the controlled group, and they dispute their statutory liability and the assessment of interest on the liability.

1. Facts

Petitioners, Ouimet Corporation, Ouimet Stay & Leather Company, Emil R. Ouimet Wareham Trust, and Ouimet Welting Company,[1] are directly or indirectly owned and controlled by Emil R. Ouimet, a Massachusetts resident. Petitioners are all involved in shoe-related manufacturing. Respondent Avon Sole Company ("Avon") and its wholly-owned subsidiary created in 1972, Tenn-ERO, were also shoe-related manufacturers which Emil Ouimet owned and controlled prior to Avon's bankruptcy in 1975.[2] Respondent Herbert Kahn is trustee in bank-

[1] Ouimet Welting Company is a dormant corporation which has been disregarded in this litigation, and future references to petitioners exclude this company.

[2] The relationship between Emil R. Ouimet and the various related entities which are parties to this action was graphically portrayed as follows by the district court (470 F. Supp. 945, 947, n.1):

[Footnote continued]

ruptcy of Avon. Respondent PBGC is a United States Government corporation established under Title IV of ERISA to administer a program of pension plan termination insurance. The PBGC guarantees payment of basic pension benefits in defined benefit pension plans with insufficient assets to pay those benefits. 29 U.S.C. §§ 1321, 1322.

In 1968, petitioner Ouimet Corporation purchased Avon for approximately $1,200,000 (J.A. II 265).[3] Shortly thereafter, Ouimet Corporation borrowed over $750,000 from its new subsidiary in return for an unsecured note (J.A. II 116). Avon subsequently sustained losses which the profitable Ouimet Corporation deducted on a consolidated tax return (J.A. II, 31; J.A. I, Supp. 90-104).

Avon sponsored a pension plan which had been established in 1954. When petitioners acquired Avon in 1968, the pension plan was underfunded by $92,000. When the plan terminated six-and-one-half years later, the plan's insufficiency was $552,339.64. During this time Emil Ouimet was the president of Avon. He participated in labor negotiations resulting in increased plan benefits which were not thereafter fully funded. Contributions to

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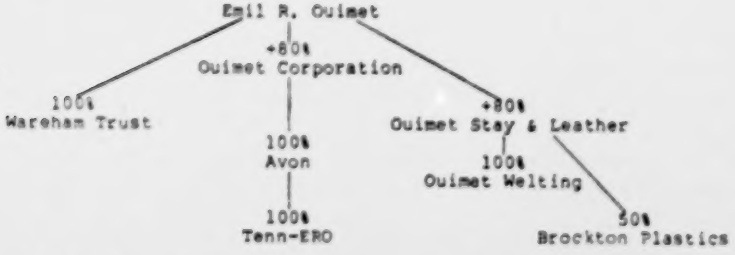
[2] [Continued]



[3] "J.A. I" refers to the Joint Appendix filed in the court of appeals on the first appeal in this case. "J.A. II" refers to the Joint Appendix filed in the court of appeals on the second appeal.

the pension plan were deducted on Ouimet Corporation's consolidated tax return.

Avon shut down its business operations on March 25, 1975, and its pension plan terminated on that date. On June 18, 1975, Avon filed bankruptcy petitions and was subsequently adjudicated bankrupt. The petitioners' operations continued to be profitable (J.A. II 250; J.A. I, Supp. 105).

In March 1976, the PBGC determined that the value of the Avon plan's guaranteed benefits exceeded the value of the plan's assets by $552,339.64. It was subsequently stipulated that the PBGC's determination was correct (J.A. II 31).

2. Proceedings Below

On April 2, 1976, the PBGC filed a civil action against petitioners to recover statutory liability with respect to the insufficiency of the plan under 29 U.S.C. §§ 1301(b), 1362. Previously, the PBGC had filed proofs of claim for the statutory liability in the Avon bankruptcy proceeding. The district court consolidated the two cases for trial before the bankruptcy judge as master, pursuant to Rule 53 of the Federal Rules of Civil Procedure.

After a 12-day trial, the master found that petitioners and Avon were trades or businesses under common control within the meaning of 29 U.S.C. § 1301(b). However, the master concluded that only the "direct employer" of the plan's participants, which was Avon, was liable under 29 U.S.C. § 1362, because the controlled group rules of Section 1301(b) did not apply to Section 1362. The master also ruled that since Avon had no net worth, the PBGC was entitled to no recovery.

The district court accepted the master's finding that petitioners and Avon (together with Tenn-ERO) constituted one controlled group within the meaning of 29 U.S.C. § 1301(b). *PBGC* v. *Ouimet Corp.*, 470 F. Supp.

945, 947, n.1 (D.C. Mass 1979). The district court held, however, that Section 1301(b) applies to liability under Section 1362. *Id.* at 954. Consequently, petitioners and Avon were held jointly and severally liable to the PBGC. The district court rejected petitioners' claim that retroactive controlled-group liability was unconstitutional and referred the case back to the master for a determination of the group's net worth.[4] *Id.* at 954-959.

On interlocutory appeal, the decision of the district court was affirmed. *PBGC* v. *Ouimet Corporation*, 630 F.2d 4 (1st Cir. 1980) ("*Ouimet I*"). The court of appeals agreed that petitioners and Avon constituted one group under Emil Ouimet's control, and held that each member of the controlled group was jointly and severally liable to the PBGC. *Id.* at 7-12. The court of appeals relied on the constitutional ruling in *Nachman Corp.* v. *PBGC*, 592 F.2d 947 (7th Cir. 1979), as to which this Court had denied certiorari, 442 U.S. 940, to reject the petitioners' argument that ERISA cannot be "retroactively" applied to impose liability on the controlled group for underfunding that predated the enactment of ERISA.[5] *Ouimet I*, 630 F.2d at 12. This Court then denied certiorari in this case on a petition which raised, *inter alia*, the constitutional "retroactivity" issue. 450 U.S. 914 (1981) (No. 80-860, O.T. 1980).

No new evidence was proffered on remand. Evidence from the earlier trial established that Ouimet Corporation is the largest manufacturer of shoe findings in the United States. The master found that the plan's insufficiency was less than 30 percent of the controlled group's

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[4] This finding was relevant because liability under Section 1362 may not exceed 30 percent of the group's net worth. 29 U.S.C. § 1362(b)(2).

[5] This Court granted certiorari on questions of statutory liability and thereafter affirmed the Seventh Circuit. 446 U.S. 359 (1980).

net worth. He also concluded that the PBGC was entitled to interest under 29 U.S.C. § 1368 at the rate established pursuant to 26 U.S.C. § 6621. He allocated the $552,339 liability among the controlled group as follows, based on the net worth of each of the entities and on the value of Avon's assets:

Ouimet Corporation	$287,497
Ouimet Stay & Leather Company	$ 95,832
Emil R. Ouimet Wareham Trust	$ 90,508
Avon	$ 78,502

The district court affirmed the master's report, and a second appeal was taken. Finding "some nuance" of a new argument presented by petitioners on the question of retroactivity, the court of appeals again sustained the district court's finding of liability. *PBGC* v. *Ouimet Corp.*, 711 F.2d 1085, 1088 (1st Cir. 1983) (*"Ouimet II"*). Pet. App. 7a-9a.

On appeal from the district court's allocation of liability among the various entities in the controlled group, the court of appeals held that the petitioners, rather than the unsecured creditors of the Avon bankruptcy estate, should pay the full amount. Pet. App. 10a-16a. The court considered the applicability of *United States* v. *Vogel Fertilizer Co.*, 455 U.S. 16 (1982), and held that *Vogel Fertilizer* did not affect the earlier finding that petitioners were within the controlled group. Pet. App. 16a-19a. Finally, the court of appeals rejected petitioners' claims that they should not be required to pay accrued interest, noting, *inter alia*, that the PBGC had already granted petitioners a one-year delay in the accrual of that interest. Pet. App. 19a-21a.

ARGUMENT

1. Rather than challenging only the alleged "retroactivity" of ERISA in its entirety—as they endeavored to do in their unsuccessful petition of three years ago—petitioners now claim, as well, that it is unconstitutional to impose upon them that portion of Avon's unfunded liability which had accrued before Ouimet Corporation purchased Avon.[6] The court of appeals correctly rejected that "nuance" of petitioners' earlier constitutional challenge, and the only authority petitioners cite to the contrary is language from an interlocutory district court decision in the same circuit that rejected the retroactivity claim in the landmark ruling of *Nachman Corp.* v. *PBGC*, 592 F.2d 947 (7th Cir. 1979), *cert. denied in part*, 442 U.S. 940 (1979), *aff'd in part*, 445 U.S. 359 (1980).

The court of appeals correctly observed that Congress did not prescribe, and the Constitution does not require, "a dollar by dollar accounting of the financial benefits controlled group members have realized as a result of their affiliation with the terminating employer" (Pet. App. 8a). In fact, the "realities of business affiliation" provided significant benefits following the purchase of Avon, such as lower taxes and cash availability. Moreover, regardless of whether benefits are received by affiliates, the owners of controlled groups in general are able to control the pension decisions of members of the group. Consequently, Congress' imposition, upon the entire controlled group, of liability for Avon's existing pension-plan underfunding was reasonable. Indeed, if the PBGC, rather

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[6] Courts of appeals have consistently rejected constitutional challenges on retroactivity grounds to employer liability under 29 U.S.C. § 1362. *E.g.*, *Concord Instruments Corp.* v. *PBGC*, 647 F.2d 701 (6th Cir. 1981), *cert. denied*, 454 U.S. 1054 (1981); *A-T-O, Inc.* v. *PBGC*, 630 F.2d 1013 (6th Cir. 1980); *In re Williamsport Milk Products Co. Inc. Retirement Plan for Salaried Employees*, 631 F.2d 726 (3d Cir. 1980). To the extent that the present petition again raises that issue, it repeats a claim that has been uniformly disapproved.

than petitioners, were compelled to bear the cost of the unfunded vested benefits in Avon's terminated plan, that expense would be passed along to businesses throughout the country through mandatory Title IV premiums. It was surely rational and constitutional for Congress to assign that burden to the entire controlled group rather than to spread it among businesses which have never had any relation whatever to the terminated plan or the company which sponsors it. *See Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 19 (1976).

The interlocutory decision in *PBGC* v. *Anthony Co.*, 537 F. Supp. 1048 (N.D. Ill. 1982), which has not been followed in any other jurisdiction, hardly justifies review of the present ruling. The ultimate ruling or practical effect of *Anthony* clearly will not be known until a final judgment is rendered in that case. Accordingly, the conflict is truly between decisions of courts of appeals and an interlocutory finding by a district court.[7]

2. The second question presented in the petition is one on which the PBGC has taken no position—whether Avon's bankruptcy estate must ultimately contribute to, or indemnify, the petitioners for a share of the liability to the PBGC. The court of appeals unequivocally held in *Ouimet I* that *all* members of the controlled group, whether bankrupt or solvent, were jointly and severally liable to the PBGC as a "single employer." *Ouimet I*, 630 F.2d at 8-12. The issue of joint and several liability was not argued in *Ouimet II*, and the earlier holding was reaffirmed.[8] Consequently, the PBGC may choose to re-

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[7] The retroactivity question presented here should not be confused, of course, with retroactivity issues raised under the Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1208. *E.g.*, *PBGC* v. *R.A. Gray & Co.*, Jurisdictional Statement pending, No. 83-245. The Avon plan was not a multiemployer plan, and the 1980 amendments do not affect this case.

[8] Petitioners err in asserting in their second Question Presented that the court of appeals "excluded the bankrupt members from . . . liability." The court said:

cover from the bankrupts, and the bankrupts could then, under *Ouimet II*, recover any amount they paid to the PBGC from the petitioners.

In determining what rights the various members of the controlled group have *inter se*, the court of appeals concluded that "[u]nder these circumstances" of this particular case (Pet. App. 15a), "the solvent members of the Ouimet Group, and not Avon's creditors, should bear responsibility for the liability to PBGC . . . ." (Pet. App. 13a). This decision was limited to the unique facts of this case. Although petitioners disagree with the result reached by the court of appeals (Pet. 18-23), they suggest no alternative formula other than a vague reference to "benefits received" by the members of the controlled group (Pet. 20). Nor do petitioners cite any conflicting authority. Hence, there is no need to review any issue relating to allocation at the present time.

3. Petitioners' efforts to convert their liability to the PBGC since 1975 into a low-cost government loan by eliminating or drastically reducing the PBGC's demand for interest were properly rejected by the court of appeals. Petitioners have cited no decision of this Court or of any court of appeals to support their challenge to the PBGC's rules computing the interest due on unpaid obligations.

Termination insurance is funded through mandatory premiums paid by statutorily defined plans and by em-

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[T]he provisions of 29 U.S.C. § 1368 (1976 & Supp. V. 1981) which in essence created a lien similar to a tax lien, evidence the intent of Congress that *as between PBGC and the bankrupt employer's creditors the termination liability should be absorbed by the creditors.* These provisions do not support the conclusion that as between controlled affiliates who are to be treated as a single employer and the direct employer's creditors the loss is to be absorbed by the creditors. [Pet. App. 13a, emphasis added]

Thus, the court assumed the liability of the bankrupt members, but was then asked to decide the ultimate allocation of joint and several liability.

ployer liability. Immediate investment of funds collected by the PBGC substantially reduces the premium burden on the nation's businesses. *See* 29 U.S.C. § 1305(b)(3). If interest were not collected, delays in the payment of premiums and employer liability to the PBGC would sharply increase ERISA's insurance premiums, contrary to Congress' stated intention. *See* 29 U.S.C. 1302(b)(2). In addition to loss of investment earnings, litigation and other collection costs would rise sharply, since there would be little incentive for timely payment. This would increase the potential for delaying payment to the PBGC, notifying the PBGC of plan terminations, and providing the PBGC with necessary records.

Congress provided that interest is to be paid upon unpaid premiums under 29 U.S.C. § 1307(b), and upon unpaid employer liability under 29 U.S.C. § 1368(a). Private debt to the government should not be subject to interest at less than the going market rate. If it were, private parties could finance their administrative and judicial litigation at the public's expense. Contested cash on hand could be used, at low interest rates, to reduce the need to borrow at the higher market rates. It would be financially advantageous to delay payment to the government, regardless of the merits of a case. For this reason, 29 U.S.C. § 1307(b) specifies that, pursuant to 26 U.S.C. §§ 6601, 6621, the interest rate on unpaid premiums approximates short-term market interest rates.

Although Section 1368(a) (which governs unpaid employer liability), unlike Section 1307(b), does not specify the interest rate or whether there may be a penalty for late payment, Congress' desire to keep premiums low and to maintain uniformity in the collection of obligations to the government was surely sufficient basis for the PBGC to adopt the market rate.

Nor is there merit to petitioners' objection to the annual compounding of interest prior to 1983. The prohibi-

tion against compounding in the Internal Revenue Code did not apply to employer liability under Title IV of ERISA. 26 U.S.C. § 6601(f)(2) (Supp. 1980). And annual compounding cannot be deemed a "penalty" in view of the common practice of daily compounding. Nor is the issue of any continuing importance. Both the Internal Revenue Code and PBGC regulations have been amended, effective January 1, 1983, to provide for daily compounding in conformity with market practice. 26 U.S.C. § 6622; 47 Fed. Reg. 55670 (Dec. 13, 1982).

Finally, it is unsound to argue, as petitioners do, that the 30 percent net worth limitation upon employer liability in 29 U.S.C. § 1362(b)(2) must apply to the *total* of principal liability and interest. Such a rule would entitle certain employers to interest-free loans at the public's expense, would provide other employers with an incentive for delaying payment until the 30 percent ceiling is reached by the total of principal and interest (after which the obligation would be interest-free), and would not be supported by a fair reading of the statute. In the absence of conflicting decisions, no review of this issue is warranted.

4. Petitioners' final claim is that Ouimet Stay and Leather Company was improperly included in the controlled group because Emil Ouimet owned only 79.2 percent of that company directly, and "attribution" to him of 13 shares owned by his wife and his father's estate was erroneous. Petitioners claim that the decision of the court below to the contrary is inconsistent with *United States* v. *Vogel Fertilizer Co.*, 455 U.S. 16 (1982). This argument ignores, however, the stipulation that Emil Ouimet was owner of record not only of 79.2 percent of the outstanding shares, but also *actual* owner of 36 more shares listed under other names (J.A. II 33-35). Thus, regardless of the attribution rules, the statutory minimum was satisfied.

Moreover, the master initially found that Emil Ouimet owned more than 80 percent of the company, and the district court agreed in 1979. 470 F. Supp. at 947, n.1, 948. The court of appeals then affirmed in *Ouimet I*, 630 F.2d at 7. Mr. Ouimet's 80 percent ownership thus was resolved for purposes of this case, irrespective of any later decision by this Court in a supposedly analogous area.

Finally, *Vogel Fertilizer* did not affect the attribution rules. *Vogel Fertilizer* invalidated a *regulation* which was inconsistent with the governing statute. 102 S.Ct. at 828. In this case, the governing *statute* provides that stock ownership is augmented through attribution rules, such as husband-wife attribution (26 U.S.C. § 1563(e)(3)) and estate-beneficiary attribution (26 U.S.C. § 1563(e)(5)). 26 U.S.C. § 1563(d). Consequently, *Vogel Fertilizer* is inapposite.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

29 U.S.C. § 1301(b) (1976)

(b) An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of section 401(c)(1) of Title 26. For purposes of this subchapter, under regulations prescribed by the [PGBC], all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of Title 26.

29 U.S.C. § 1307(b) (1976)

If any basic benefit premium is not paid when it is due the [PBGC] is authorized to assess a late payment charge of not more than 100 percent of the premium payment which was not timely paid. The preceding sentence shall not apply to any payment of premium made within 60 days after the date on which payment is due, if before such date, the plan administrator obtains a waiver from the [PBGC] based upon a showing of substantial hardship arising from the timely payment of the premium. The [PBGC] is authorized to grant a waiver under this subsection upon application made by the plan administrator, but the [PBGC] may not grant a waiver if it appears that the plan administrator will be unable to pay the premium within 60 days after the date on which it is due. If any premium is not paid by the last date prescribed for a payment, interest on the amount of such premium at the rate imposed

under section 6601(a) of Title 26 (relating to interest on underpayment, nonpayment, or extensions of time for payment of tax) shall be paid for the period from such last date to the date paid.

29 U.S.C. § 1362(a)-(c) (1976 and Supp. V 1981)

(a) This section applies to any employer who maintained a single-employer plan at the time it was terminated . . . .

• • • •

(b) Any employer to which this section applies shall be liable to the [PBGC], in an amount equal to the lesser of—

(1) the excess of—

(A) the current value of the plan's benefits guaranteed under this subchapter on the date of termination over

(B) the current value of the plan's assets allocable to such benefits on the date of termination, or

(2) 30 percent of the net worth of the employer determined as of a day, chosen by the [PGBC] but not more than 120 days prior to the date of termination, computed without regard to any liability under this section.

(c) For purposes of subsection (b)(2) of this section the net worth of an employer is—

(1) determined on whatever basis best reflects, in the determination of the [PBGC], the current status of the employer's operations and prospects at the time chosen for determining the net worth of the employer, and

(2) increased by the amount of any transfers of assets made by the employer determined by the corporation to be improper under the circum-

stances, including any such transfers which would be inappropriate under Title 11 if the employer were a debtor in a case under chapter 7 of such title.

29 U.S.C. § 1368 (1976 and Supp. V 1981)

(a) If any employer or employers liable to the [PGBC] under section 1362, 1363, or 1364 of this title neglect or refuse to pay, after demand, the amount of such liability (including interest), there shall be a lien in favor of the [PGBC] upon all property and rights to property, whether real or personal, belonging to such employer or employers.

(b) The lien imposed by subsection (a) of this section arises on the date of termination of a plan, and continues until the liability imposed under section 1362, 1363, or 1364 of this title is satisfied or becomes unenforceable by reason of lapse of time.

* * * *

(c)(2) In the case under Title 11 or insolvency proceedings, the lien imposed under subsection (a) of this section shall be treated in the same manner as a tax due and owing to the United States for purposes of Title 11 or in section 191 of Title 31.

* * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 419350 117

Court, U.S.
FILED
OCT 4 1983
ALEXANDER L. STEVAS,

No. 83-397

In the Supreme Court of the United States

OCTOBER TERM, 1983

OUIMET CORPORATION, OUIMET STAY & LEATHER COMPANY, OUIMET WELTING COMPANY and EMIL R. OUIMET WAREHAM TRUST,

PETITIONERS,

v.

PENSION BENEFIT GUARANTY CORPORATION, AVON SOLE COMPANY, TENN-ERO CORPORATION and HERBERT KAHN, TRUSTEE,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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Blanchard Press, Inc. Boston, Mass. Law Printers

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

Respondent Herbert C. Kahn, bankruptcy trustee of the estates of Avon Sole Company and Tenn-Ero Corporation, hereby opposes the petition for a writ of certiorari filed by Ouimet Corporation *et al.* in this case.

Summary of Argument

The constitutional challenge to the retroactive application of the termination liability provisions of the Employee Retirement Income Security Act of 1974 that has been asserted by the petitioners is just a slightly restated and limited version of the same argument made by petitioners in an earlier appeal.

The argument was rejected by the Court of Appeals for the First Circuit, which followed an earlier decision of the Court of Appeals for the Seventh Circuit, and this Court denied certiorari. Petitioners have presented no new reasons why their retroactivity argument should be considered by this Court at this time.

Petitioners' assertion that the First Circuit decision in this matter is inconsistent with an earlier decision of the same court does not provide a reason for granting certiorari, both because the two decisions are in fact consistent and also because, even if they were not, the proper forum for resolution of the conflict would be the First Circuit Court of Appeals itself.

Respondent Herbert C. Kahn joins in the position of the Pension Benefit Guaranty Corporation in seeking denial of certiorari upon the other issues raised by the petitioners.

Argument

I. The Holding of the Court of Appeals Concerning Retroactivity Is Not of Sufficient Importance To Require Review by This Court.

This Court has already considered and upheld the retroactive application of the termination liability provisions of the Employee Retirement Income Security Act of 1974, Pub. L. 93-406, 88 Stat. 832, *codified at* 29 U.S.C. § 1001 *et seq.* (hereinafter "ERISA"), on statutory grounds. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980), *affirming* 592 F.2d 947 (7th Cir. 1979). This Court declined to review the issue on constitutional grounds (446 U.S. at 368), even though the constitutional argument had been made and determined by the Court of Appeals. 592 F.2d at 958-63. The constitutional and statutory arguments concerning retroactivity were made and rejected in an earlier appeal by the petitioners, and this Court declined to grant certiorari.

Pension Benefit Guaranty Corp. v. *Ouimet Corp.*, 630 F.2d 4, 12-13 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981) (hereinafter referred to as "*Ouimet I*").

The decision that petitioners are now asking this Court to review, *Pension Benefit Guaranty Corp.* v. *Ouimet Corp.*, 711 F.2d 1085 (1st Cir. 1983) (hereinafter referred to as "*Ouimet II*"), presents a less important version of the same question. Whereas *Ouimet I* concerned the retroactive assessment of any pension underfunding liability (630 F.2d at 12), the petitioners in *Ouimet II* question only whether they, as members of a controlled group that acquired new members before ERISA took effect, can constitutionally be held liable for underfunding of the new members' pension plan *to the extent that such underfunding already existed on the acquisition date.* (Petition at 5-6.) Certainly if ERISA had been in effect at the time the petitioners added new members to their controlled group, they could raise no constitutional challenge to sharing the new members' pre-existing contingent liability for underfunding. Only the fact that ERISA was not in effect at the time of the acquisition creates even a colorable constitutional issue. The Court of Appeals determined in *Ouimet I* that there was no violation of the Constitution (630 F.2d at 12) and this decision is now the law of this case.

The petitioners have not presented any new reason for this Court to consider the retroactivity of ERISA. Rather, the petitioners rely primarily upon *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U.S. 330 (1935), and its progeny, which the Court of Appeals deemed inapposite in *Ouimet I* (630 F.2d at 12) in a decision that this Court declined to review. 450 U.S. at 914. Petitioners' reliance on the *Alton Railroad* line of cases is simply misplaced where, as here, Congress made detailed findings concerning the urgent need for the termination liability provisions of ERISA, adopted a rational and limited means to a legitimate end, and did no more than provide a mechanism to enforce an already existing contractual liability. *See Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, *supra*, 592 F.2d at 958-63.

II. There Is No Inconsistency Among the Courts of Appeals Concerning Allocation of Liability Among Members of a Controlled Group, Nor Is This Issue Ripe for Review.

Petitioners' assertion of inconsistency between the earlier and later decisions of the Court of Appeals for the First Circuit does not present a persuasive ground for intervention by this Court. Petitioners do not allege a conflict between different Courts of Appeals. *Cf.* Sup. Ct. R. 17(1)(a). Even if a conflict between panels of the same Court of Appeals existed here, the appropriate forum for resolving the inconsistency would be the Court of Appeals, not this Court. *Davis* v. *United States*, 417 U.S. 333, 340 (1974).

More fundamentally, there is no conflict between panels of the First Circuit. Examination of the decisions in *Ouimet I* and *Ouimet II* reveals, first of all, that Judge Bownes wrote both of them. As would be expected under these circumstances, the two decisions reflect a consistent interpretation of ERISA's statutory scheme.

Under ERISA Section 4062, 29 U.S.C. § 1362, an employer is liable to the Pension Benefit Guaranty Corporation ("PBGC"), upon termination of a pension plan, for the lesser of the amount by which the plan is underfunded or 30% of the employer's net worth. *Ouimet I* held that members of a group under common control are to be treated as one employer for purposes of termination liability. *Pension Benefit Guaranty Corp.* v. *Ouimet Corp.*, 470 F. Supp. 945, 954 (D. Mass. 1979), *aff'd*, 630 F.2d 4 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981). After stating this conclusion, the District Court added: "Thus, the PBGC may impose termination liability, jointly and severally, on each member of a controlled group, whether or not such member contributed to the terminated pension plan." *Id.* The Court of Appeals referred to this holding and then stated: "We affirm, but on somewhat different grounds." 630 F.2d at 8. Other than this single offhand reference to joint

and several liability, the Court of Appeals in *Ouimet I* did not discuss the allocation of liability among members of the controlled group.

In *Ouimet II*, the issue of allocation was squarely presented. The District Court affirmed the Bankruptcy Court's determination that liability should be allocated among members of a controlled group in proportion to the members' net worth, except that in the case of bankrupt members having no net worth, the value of their assets should be considered their net worth. *Pension Benefit Guaranty Corp.* v. *Ouimet Corp.*, 711 F.2d 1085, 1088 (1st Cit. 1983).[1] The Court of Appeals agreed that liability should be allocated in proportion to net worth, but held that substituting asset value for net worth in the case of bankrupt companies "reads more into the statute than we are willing to accept." *Id.* at 1092. The court did not authorize the PBGC to collect from any member in excess of its pro rata share (*i.e.*, 30% of its net worth) and explicitly rejected the petitioners' attempt to do so under theories of contribution and indemnification. *Id.* at 1090-91. These holdings are completely consistent with the court's position on the issues that were actually discussed and determined in the *Ouimet I* decision.

Finally, the petitioners have erred in mistaking limitation for inconsistency. It is not *inconsistent* to say that while liability of members of a controlled group is joint and several, it is *limited* to 30% of the net worth of each. Indeed, this is the only rational construction of a statute that explicitly limits liability to 30% of net worth but does not explicitly provide for joint and several liability. ERISA § 4062(b)(2), 29 U.S.C. § 1362(b)(2). The net worth limitation does not eliminate the advantages to PBGC of joint and several liability; in a case where the termination liability were less than 30% of the net worth of each member of a controlled group, the principle of joint and several liability would allow PBGC to attempt col-

[1] The decision of the District Court is not reported.

lection of the full amount from any member of the controlled group. Perhaps this question will be presented in a future case, in which solvent members of a controlled group are disputing allocation of termination liability among themselves. In the instant case, the only actual dispute was between all solvent members of the controlled group on the one hand, and all insolvent members on the other hand. Hence the actual holding of the Court of Appeals in *Ouimet II* was a narrow one: no member of a controlled group that is insolvent, and thus has no net worth, can be liable to PBGC or to other members of the controlled group for any amount. This holding is both correct and consistent with the earlier decision.

Along with the alleged inconsistency between the Court of Appeals decisions in *Ouimet I* and *Ouimet II*, petitioners have asserted that *Ouimet II* is inconsistent with ERISA because the statute provides for claims of the PBGC to be asserted and have priority in bankruptcy proceedings. ERISA § 4068, 29 U.S.C. § 1368; Petition at 15. Evidently the petitioners mean to argue that since Congress provided for PBGC to assert claims in bankruptcy cases, Congress must have intended PBGC to have a claim against a company having no net worth at the time of termination of its pension plan. But this does not follow at all. The utility of Section 1368 arises when a company having some net worth at the time it terminates a pension plan later becomes bankrupt without having paid PBGC. Thus, there is no inconsistency between ERISA and *Ouimet II*.

The petitioners' assertion that the Court of Appeals in *Ouimet II* imposed "an additional step to the imposition of termination liability" (Petition at 16) does not present a substantial issue for determination by this Court. It is clear on the face of the statute, and petitioners do not deny, that Congress after careful consideration chose to limit an employer's liability to 30% of its net worth. The Court of Appeals construed the statute to mean that, where the "employer" comprises more than one company, no company may be liable for more than

30% of its own net worth. Far from imposing "an extra step" not intended by Congress, the court adopted the only possible construction that would not disregard the legislative intent to limit termination liability to 30% of the terminating employer's net worth.

Similarly, the petitioners' accusation that the Court of Appeals was not fair in its allocation in this case (*id.* at 18-20) does not present an issue of broad applicability and is, in any event, adequately answered by the Court of Appeals. The Court noted that the allocation "is really one between the solvent members of the Ouimet Group and the creditors of the bankrupt companies" (711 F.2d at 1091) and it hardly seems unfair that responsibility should be placed upon the solvent companies that, as members of a controlled group, shared in the benefits of the bankrupt companies' pension plan.

Finally, even if the question of how termination liability should be allocated among members of a controlled group might someday acquire sufficient importance to require determination by this Court, the issue is not ripe at this time. Petitioners have not cited a single decision other than *Ouimet II* that addresses this issue. If the issue should ever arise again, it may well do so in a very different factual context, for example, in a dispute over allocation between a *solvent* company terminating its own underfunded pension plan and other members of a controlled group. The issue will probably never require resolution by this Court. It certainly does not require resolution now.

III. The Remaining Issues Raised by the Petitioners Do Not Affect the Respondent Bankruptcy Trustee.

In addition to the issues discussed earlier in this brief, the petitioners have sought certiorari on the question whether interest on PBGC's claim is subject to the same 30%-of-net-worth limitation as the claim itself and whether the Court of Appeals misconstrued this Court's decision in *United States* v. *Vogel Fertilizer Co.*, 455 U.S. 16 (1982). The determination of

these issues will not, by itself, affect the bankruptcy estates of Avon Sole Company and Tenn-Ero Corporation. However, your respondent bankruptcy trustee of these estates joins in the assertion of the PBGC that these issues do not merit review by this Court.

IV. Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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